Supreme Court, U.S.
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No. 00-_____

IN THE SUPREME COURT OF THE UNITED STATES

PHILIP LOUIS LUCERO.)
)
Petitioner.)
)
v.)
)
STATE OF CALIFORNIA.)
)
Respondent.)
_____)

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

PETER DODD
Attorney at Law
P.O. Box 380
Hornbrook, CA 96044
(541) 857-2784

Attorney for Petitioner
PHIILIP LUCERO

73 pp

CAPITAL CASE

QUESTIONS PRESENTED

I.

Did the introduction of petitioner's invocation of his *Miranda* rights when interrogated by the police, make the assertion of those rights costly in violation of the Due Process Clause of the United States Constitution?

II.

Does the California statutory scheme sufficiently narrow the class of persons eligible for the death penalty so as to satisfy the requirements of *Godfrey v. Georgia* 446 U.S. 420 (1980) and the Eighth Amendment to the United States Constitution?

LIST OF PARTIES

The caption of the case contains the names of all parties to this proceeding in the court whose judgment is sought to be reviewed (the California Supreme Court).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PRAYER FOR RELIEF 1

JUDGMENT 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

PRESERVATION OF FEDERAL QUESTION 2

STATEMENT OF THE CASE 3

A. The Underlying Facts 3

B. Proceedings in the California Courts 4

REASONS FOR GRANTING THE WRIT 6

A. Introduction 6

B. The Due Process Clause Bars Introduction of a Criminal Defendant's Invocation of His *Miranda* Rights 6

TABLE OF CONTENTS cont.

C. The Eighth Amendment Bars Imposition of the Death Penalty Where the Statutory Scheme Does Not Sufficiently Narrow the Class of Persons Who Are Presumptively Eligible for the Death Penalty 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Brecht v. Abrahamson, 507 U.S. 619 (1993) 8

Bruton v. United States, 391 U.S. 123 (1968) 7

Chapman v. California, 386 U.S. 18 (1967) 8

Doyle v. Ohio, 426 U.S. 610 (1976) 6, 8, 13

Fletcher v. Weir, 455 U.S. 603 (1982) 7

Furman v. Georgia, 408 U.S. 238 (1972) 9

Godfrey v. Georgia, 446 U.S. 420 (1980) 9, 13, 14

Jenkins v. Anderson, 447 U.S. 231 (1980) 7

Lewis v. Jeffers, 497 U.S. 764 (1990) 9

Miranda v. Arizona, 384 U.S. 436 (1966) .. 4, 5, 6, 7, 8, 9, 13, 14

People v. Wader, 5 Cal.4th 610 (1993) 5

Tuilaepa v. California, 512 U.S. 967 (1994) 13

United States v. Hale, 422 U.S. 171 (1975) 6, 8

United States v. Newman, 943 F.2d 1155 (9th Cir. 1991) 5, 8

United States v. Valencia, 773 F.2d 1037 (9th Cir. 1985) 8

TABLE OF AUTHORITIES cont.

United States v. Wycoff, 545 F.2d 679 (9th Cir. 1976) 8

Wainwright v. Greenfield, 474 U.S. 284 (1986) 7

STATUTES

28 U.S.C. §1257 1

California Penal Code Section 189 12

California Penal Code Section 190.2 ..... 9, 12, 13

California Penal Code Section 1239(b) 5

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V 2

United States Constitution, Amendment VIII 2, 3, 9, 14

United States Constitution, Amendment XIV, Section 1 2

PETITION FOR WRIT OF CERTIORARI

PRAYER FOR RELIEF

A California trial court has imposed the sentence of death on Philip Lucero ("Lucero"). Lucero now respectfully petitions for a writ of certiorari to review, and thereafter reverse, the judgment of the California Supreme Court affirming his death sentence.

JUDGMENT

The judgment of death was entered against Mr. Lucero on October 3, 1989 in *People v. Lucero*, San Bernardino Superior Court SCR-36822.

The opinion of the California Supreme Court, affirming petitioner's death sentence, was filed on July 13, 2000, and is attached hereto as Appendix A. The opinion is published at 23 Cal.4th 692 (2000). The Court's modification of opinion filed August 30, 2000, which did not alter the judgment, is attached hereto as Appendix B. The order denying petitioner's timely filed petition for rehearing, also entered on August 30, 2000, is attached hereto as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

The California Supreme Court entered its judgment on July 13, 2000, and modified its original opinion and denied Mr. Lucero's timely petition for rehearing on August 30, 2000. (Appendices B and C.)

On November 17, 2000, the Honorable Sandra Day O'Connor granted petitioner's application to extend time to file this petition to on or before December 28, 2000. (Appendix D.)

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Constitution, Amendment V:

"No person ... shall be compelled in any criminal case to be a witness against himself . . . ."

The United States Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

PRESERVATION OF FEDERAL QUESTION

Petitioner argued in his appeal to the California Supreme Court that the introduction of evidence that petitioner had invoked his right to counsel when questioned by the police, violated the Fourteenth Amendment (due process of law) to the United States Constitution. Petitioner also argued in that appeal that California's death penalty

statute failed to narrow adequately the class of persons eligible for the death penalty, in violation of the Eighth Amendment.

The California Supreme Court, in its opinion in this case, reviewed and ruled on the federal questions raised by petitioner regarding the invocation of his right to counsel. (Appendix A, pp. 8-10.) The Court also reviewed and ruled on the federal questions raised by petitioner regarding the failure to narrow the class of persons subject to the death penalty. (Appendix A, p. 47.) The Court rejected each of the above arguments.

STATEMENT OF THE CASE

A. The Underlying Facts

As described in the opinion of the California Supreme Court, on April 12, 1980, two young girls failed to return home at about 5:00 p.m. The sheriff's department began a search, and somewhere about 7:00 p.m. a neighbor observed petitioner's house on fire. When firemen arrived on the scene, they noticed a large bloodstain on the carpet in petitioner's home. (Appendix A, pp. 2-3.)

Petitioner arrived at his house around 9 p.m. (Reporter's Transcript [RT] 2803.) At around the same time, someone found the fully clothed bodies of the two missing girls, wrapped in garbage bags, in a dumpster outside a nearby market. Deputies noted that there was blood on petitioner's clothes and all over his car. Shoes which appeared to match one of the victims were located in petitioner's living room. Garbage bags similar to the ones used to wrap the children's bodies were found in petitioner's kitchen. (Appendix A, pp. 3-4.)

Lieutenant Dvorak was one of the investigating officers for the sheriff's department. (RT 3025.) He began interrogating petitioner

at about midnight of April 12, 1980, and continued questioning until about 6 a.m. on April 13, 1980. (RT 3025-3026.) The interrogation ceased when petitioner asked to speak to an attorney. (RT 3026-3027; Appendix A, p. 8.)

B. Proceedings in the California Courts

Petitioner's initial trial on the charge of capital murder occurred in 1981. (Appendix A, p. 1.) After his conviction, and sentence of death, the case came on appeal to the California Supreme Court. (Appendix A, p. 1.) In 1988 the California Supreme Court affirmed the judgment as to guilt, but reversed as to penalty, and remanded the case to the trial court for a retrial on the penalty phase. (Appendix A, p. 1.) The retrial is the subject of this petition. Petitioner did not testify at either the original trial or the penalty retrial.

At petitioner's penalty retrial, petitioner's counsel made clear that he was objecting to any reference to the fact that petitioner requested his *Miranda* rights when questioned by the authorities. (RT 3032, 3876.) Lieutenant Dvorak testified for the prosecution, and when asked to characterize petitioner's demeanor, Dvorak responded that at first it was cordial, but that eventually petitioner caused the questioning to cease by requesting to talk to his attorney. (RT 3026-3027; Appendix A, p. 8.) Petitioner's counsel objected to this reference to the invocation of petitioner's rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and moved to strike the offending testimony. (Appendix A, p. 8.) Initially the trial court took no action on counsel's motion to strike, but the next day the court admonished the jury to disregard that portion of the testimony, and denied counsel's motion for a mistrial. (Appendix A, pp. 8.)

On appeal to the California Supreme Court[1], that court upheld the judgment of the trial court, holding that the mention of petitioner's invocation of his *Miranda* rights was not prejudicial. (Appendix A, pp. 8-9.) The California Supreme Court recognized that ordinarily such a reference is dangerous, since it creates the risk that the jury will infer from the invocation of the rights that the defendant is guilty, citing *United States v. Newman* 943 F.2d 1155, 1157 (9th Cir. 1991). (Appendix A, p. 9.) But since the trial in question only involved penalty, not guilt, the California Supreme Court concluded that there was no such danger. (Appendix A, p. 9.) Further, the court noted that neither Lieutenant Dvorak, nor the prosecutor, asked the jury to make an inference that the invocation of his *Miranda* rights indicated that petitioner was deserving of the death sentence. (Appendix A, p. 9.)

The California Supreme Court also rejected petitioner's claim that the California statutory scheme failed to narrow sufficiently the class of persons eligible for the death penalty. (Appendix A, p. 46.) The California Supreme Court merely reiterated that it had decided the issue adversely to petitioner's claim, in earlier cases such as *People v. Wader* 5 Cal.4th 610, 669 (1993). (Appendix A, p. 46.)

This is a timely petition for a writ of certiorari to the California Supreme Court. This petition has been filed within the extension of time allowed by Justice Sandra Day O'Connor.

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[1] There is no intermediate California appellate court that hears death penalty appeals. Pursuant to California Penal Code §1239, subdivision (b), the appeal is automatic to the California Supreme Court.

REASONS FOR GRANTING THE WRIT

A. Introduction

The writ should be granted to remedy violations of petitioner's right to invoke his *Miranda* rights during interrogation by the police, without being made to suffer adverse consequences for such invocation, in violation of due process. Addressing this issue on the merits will assist the lower courts in resolving the issue of whether reference to a criminal defendant's invocation of *Miranda* rights is prejudicial.

The writ should also be granted to resolve the issue of whether the California statutory scheme sufficiently narrows the class of persons eligible for the death penalty. This issue could potentially affect all persons upon whom the death penalty has been imposed in recent years.

B. The Due Process Clause Bars Introduction of a Criminal Defendant's Invocation of His *Miranda* Rights

In *Doyle v. Ohio* 426 U.S. 610, 618 (1976) this court concluded that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach ..." a defendant at trial. This court relied upon language in *United States v. Hale* 422 U.S. 171, 182-183 (1975) that when a defendant is given his *Miranda* rights, "it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest ...."

The prohibition on calling attention to a defendant's invocation of *Miranda* rights is not limited to proceedings where guilt is at issue. In a proceeding where the sole issue is the sanity of the defendant, it is likewise a violation of due process for the prosecution to introduce

the defendant's invocation of his *Miranda* rights in an attempt to prove his sanity. (*Wainwright v. Greenfield* 474 U.S. 284, 292 (1986.) Therefore the California Supreme Court's conclusion that the witness' reference to petitioner asserting his *Miranda* rights did not offend due process because guilt was not in issue in the proceeding, was contrary to the rationale of *Wainwright*.[2]

The California Supreme Court's other basis for asserting that there was no prejudice flowing from the reference to petitioner's assertion of his *Miranda* rights is also contrary to federal holdings. The California Supreme Court suggested that since neither the prosecutor nor Dvorak asked the jury to draw an inference in favor of death from the invocation of rights, that no prejudice ensued. This reasoning is not persuasive.

First, a powerfully incriminating statement of a defendant is very hard for jurors to ignore, even where they are directed to do so by the trial court. (*Bruton v. United States* 391 U.S. 123, 135-136 (1968). Admittedly, the statement in *Bruton* was a confession, related by a co-defendant. But similar considerations of prejudice apply to the instant situation. Although lawyers might not characterize petitioner's statement as a confession, lay jurors are likely to place the invocation of *Miranda* rights, under police questioning, in a similar category. To a layman, why else would a person invoke his *Miranda* rights and request a lawyer, if not because of his guilt?

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[2] Neither *Jenkins v. Anderson* 447 U.S. 231 (1980) nor *Fletcher v. Weir* 455 U.S. 603 (1982) hold to the contrary, since both those cases involved situations where a defendant had chosen to take the stand at trial, and thus had chosen to waive his right to remain silent. Petitioner never chose to take the witness stand.

This court held that the probative value of a defendant's invocation of his right to remain silent and to have the assistance of counsel is very slight, while the prejudicial effect is quite heavy. (*Doyle, supra,* 426 U.S. at p. 617; *United States v. Hale* 422 U.S. 171, 180 (1975.) Decisions of the lower federal courts are in accord. In *United States v. Wycoff* 545 F.2d 679, 681 (9th Cir. 1976) the court observed that "[t]he natural tendency of the use of the testimony in this manner is to prejudice the defendant by attempting to create an inference of guilt in the jury's mind." (*United States v. Valencia* 773 F.2d 1037, 1042 (9th Cir. 1985); *United States v. Newman* 943 F.2d 1155, 1157 (9th Cir. 1991).)

The prejudice from the introduction of evidence that petitioner invoked his *Miranda* rights was severe, and was not cured by the court's instruction, the next day, to ignore the offending testimony. This court's prior decisions hold that since the error involves a federal constitutional right (due process), the standard of prejudice is whether the prosecution can prove that the error was harmless beyond a reasonable doubt per *Chapman v. California* 386 U.S. 18, 22 (1967). (*Brecht v. Abrahamson* 507 U.S. 619, 629-630 (1993).)

In the instant case, the evidence on whether death was the proper penalty was at least evenly balanced. The only statutory factor advanced by the prosecution to support the imposition of the death penalty was the manner of the killings. The defense presented substantial evidence of mitigating factors, including petitioner's troubled upbringing by an alcoholic father; his abandonment by his mother at an early age; his general neglect during his formative years; his complete lack of a prior criminal record; his faithful service to his country during three tours of duty as a soldier in Vietnam; and his history as a responsible employee and a good husband. Evidence was also presented that petitioner suffered from untreated post-traumatic stress disorder related to his experiences in the military in the Vietnam war. Viewed in that light, it cannot be said that Lieutenant

Dvorak's introduction of evidence that petitioner invoked his *Miranda* rights when questioned by the police, was harmless beyond a reasonable doubt.

C. The Eighth Amendment Bars Imposition of the Death Penalty Where the Statutory Scheme Does Not Sufficiently Narrow the Class of Persons Who Are Presumptively Eligible for the Death Penalty

This Court has long held that "[a] capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." (*Godfrey v. Georgia* 446 U.S. 420, 427-428 (1980); see also *Lewis v. Jeffers* 497 U.S. 764, 775 (1990); *Furman v. Georgia* 408 U.S. 238, 313 (1972 - White, J., concurring.)

Petitioner asserts that the California statutory scheme in the eligibility phase, namely Penal Code section 190.2, does not sufficiently narrow the class of persons who are eligible for the ultimate penalty to the few cases where it is appropriate. In 1980 (the year of petitioner's crimes), Penal Code section 190.2 contained 19 special circumstances [equivalent to aggravating factors], some of which contained multiple subsections.[3] Almost

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[3] The special circumstances listed in the statute are:

"(1) The murder was intentional and carried out for financial gain.

"(2) The defendant was previously convicted of murder in the first degree or second degree. . .

"(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

"(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place,

(continued...)

[3](...continued)
area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

"(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

"(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or beings.

"(7) The victim was a peace officer . . . who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer . . . and was intentionally killed in retaliation for the performance of his official duties.

"(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

"(9) The victim was a fireman. . . who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

"(10) The victim was a witness to a crime who was intentionally

(continued...)

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[3](...continued)
killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

"(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's duties.

"(12) The victim was a judge or former judge of any court of record in the local, state federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's duties.

"(13) The victim was an elected or appointed official or former official of the Federal Government, a local or state government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's duties.

"(14) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

"(15) The defendant intentionally killed the victim while lying in wait.

"(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

"(17) The murder was committed while the defendant was engaged in, or was an accomplice in the commission of, attempted

(continued...)

all first degree murders would necessarily qualify as death eligible because of the substantial overlap between the definition of first degree murder (Penal Code section 189)[4] and the various "special

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[3](...continued)
commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery . . .

(ii) Kidnapping . . .

(iii) Rape . . .

(iv) Sodomy

(v) The performance of a lewd and lascivious act upon person of a child under the age of 14 . . .

(vi) Oral copulation . . .

(vii) Burglary . . .

(viii) Arson . . .

(ix) Train wrecking . . .

"(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

"(19) The defendant intentionally killed the victim by the administration of poison."

(Cal. Pen. Code §190.2; initiative adopted November 7, 1978.)

[4] At the time of petitioner's crimes, California Penal Code section 189 defined first degree murder as follows:

> All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 [e.g., rape, oral copulation], (continued...)

circumstances" (Penal Code section 190.2). In fact, most murders in California qualify as first degree murder, in part because of the wide scope of the felony-murder doctrine.

In practice, California reported cases show that a vast majority of murders, whether first or second degree, could have resulted in one or more special circumstances being found, and thus could be death-eligible. These cases reveal that instead of narrowing the cases to those few murders where the ultimate penalty was appropriate, the statutory scheme in California made the vast majority of murders death eligible.

Although this Court has addressed the question of whether particular "special circumstances" set forth in the California statutory scheme are constitutional, it has not directly decided whether the overall scheme properly performs the narrowing function specified in *Godfrey*. (*Tuilaepa v. California* 512 U.S. 967 [114 S.Ct. 2630, 2641 (concurring opinion); 2646 (dissent)] (1994).) It is now an appropriate time to settle this long standing question of whether the California eligibility phase appropriately narrows the class of death eligible murderers.

CONCLUSION

Under *Miranda v. Arizona* 384 U.S. 436 (1966) a person is entitled to invoke the assistance of counsel when faced with interrogation by the police. Under *Doyle v. Ohio* 426 U.S. 610 (1976) a person's invocation of his *Miranda* rights cannot be used at trial to his detriment, without offending the Due Process Clause.

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[4](...continued)
is murder of the first degree; and all other kinds of murders are of the second degree.

When Detective Dvorak mentioned that petitioner had terminated the interview by exercising his rights under *Miranda*, he made the exercise of those rights a costly one, in violation of the Due Process Clause.

The California statutory scheme to determine death eligibility results in almost all first degree murders, and the vast majority of all murders, death eligible. Therefore this scheme does not provide the narrowing function required by *Godfrey v. Georgia* 446 U.S. 420 (1980), and offends the Eighth Amendment.

Therefore the petition for writ of certiorari should be granted.

Dated: December 22, 2000

Respectfully submitted,

PETER DODD
Attorney at Law
P.O. Box 380
Hornbrook, CA 96044
(541) 857-2784

Attorney for Petitioner
PHILIP LUCERO

APPENDIX A

[Filed July 13, 2000]

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	S012568
	)	
v.	)	
	)	
PHILIP LOUIS LUCERO,	)	
	)	San Bernardino County
Defendant and Appellant.	)	Super. Ct. No. 36822
	)	

This is the second time this case is before us. In 1981, defendant Philip Louis Lucero was sentenced to death after a jury found him guilty of two counts of murder (Pen. Code, § 187)[5] and one count of arson (§ 451, subd. (c)), and found true an alleged multiple-murder special circumstance. In 1988, we affirmed the judgment of guilt, including the special circumstance finding, but we reversed the judgment of death, holding that the trial court had improperly excluded certain mitigating evidence at the penalty phase of trial. (*People v. Lucero* (1988) 44 Cal.3d 1006.) At retrial, the jury again imposed the death penalty. This appeal, like the earlier one, is automatic. (§ 1239.) We affirm the judgment of death.

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[5] All further statutory references are to the Penal Code unless otherwise stated.

I. FACTS

A. Prosecution's Evidence

The prosecution's case-in-chief at the penalty retrial consisted solely of evidence of the two murders of which defendant was convicted.

The murder victims, seven-year-old Linda Christine Hubbard (Chrissy) and 10-year-old Teddy Engilman (Teddy), lived in Yucaipa, a town in San Bernardino County. On April 12, 1980, Chrissy asked her father if she could go with Teddy to a nearby park. He agreed, and the two girls left around 4:00 p.m. Lisa Willis, an acquaintance of Teddy's older sister, saw the two girls at the park.

Defendant lived in a house across the street from the park. Teddy's brother had shown Chrissy a shortcut to the park that passed alongside defendant's house. Between 4:30 and 4:45 p.m., Ruth Schultz, who lived next door to defendant, heard the goose in defendant's yard cackle. From her window, she saw Teddy and Chrissy outside defendant's backyard, and she saw defendant walking toward them. He told the girls the goose would not hurt them and they could come into the yard.

At 5:00 p.m., the Hubbards discovered that Teddy and Chrissy were not in the park and had not returned home. They called the sheriff's office, and a search for the girls began. At 6:45 p.m., Delores Gwaltney, who lived across the street from defendant, saw him drive away from his house. Defendant returned five or 10 minutes later but soon left again. Shortly thereafter, Gwaltney saw that defendant's house was on fire. She telephoned defendant at his father's home and told him about the fire. Defendant seemed unconcerned. San Bernardino Sheriff's Deputy Charles Long, who

had been looking for Chrissy and Teddy, also saw the fire and rescued defendant's dog from defendant's enclosed front porch.

Dennis Draeger, Chief of the Calimesa Volunteer Fire Department, together with Captain Charles Bryant and Firefighter Steven Beightler, both of the California Department of Forestry, were among those who arrived to put out the fire in defendant's house. When they entered the house, they saw a large bloodstain on the living room carpet. Defendant soon arrived. Captain Bryant asked him about the origin of the bloodstain, but defendant had no explanation. Defendant then left to examine his dog, and when he returned he told Bryant the dog had a cut on its leg that could have caused the stain. Firefighter Beightler had seen the dog and it appeared uninjured. In defendant's conversations with Captain Bryant and Chief Draeger, he seemed unconcerned about the fire but wanted to know how long the firefighters intended to stay in his house.

About 9:00 o'clock that evening, Donald Burton was rummaging through a dumpster behind a nearby market when he saw an object that he thought was a mannequin. When he touched the object's leg, it was warm and felt like a child's leg. He called the San Bernardino County Sheriff's Office. Sheriff's deputies summoned to the scene found the bodies of Chrissy and Teddy in the dumpster, wrapped in plastic garbage bags. They were fully dressed, but Teddy's shoes were missing. Defendant was arrested later that night. Deputy Sheriff Dennis O'Rourke saw what appeared to be bloodstains on defendant's T-shirt and pants leg, and the sock on his left foot was saturated with blood.

Deputy Sheriffs Ronald Durling and James Stalnaker examined defendant's car. They found bloodstains on the driver's side door, the armrest, the dashboard, the steering wheel, and the gearshift lever. There was a pool of blood on an inner tube stored in the trunk of the

car. Homicide Detective Larry Malmberg, Deputy Carl Swanlund, and criminalist Phillip Kellet searched defendant's house. In the living room, they found Teddy's shoes (partly covered by a comforter), a bloodstained sheet, an electrical cord, several large soft drink bottles, and pieces of another bottle. Other fragments of the broken bottle were in the garbage bag in which Teddy was found. A piece of rope was in the doorway, and in the kitchen were garbage bags similar to the ones used to wrap Chrissy and Teddy.

A pathologist, Dr. Harry Scott, conducted an autopsy of the two girls. He found a large bruised area on Teddy's right eye and cheek, a laceration of her right earlobe, and a penetrating wound through her right lip that had knocked out three of her teeth. Her skull was fractured in several places as a result of being hit several times with a blunt object, which could have been a soft drink bottle. Dr. Scott determined that the blows to Teddy's head had knocked her unconscious, and that while unconscious she had aspirated blood from the wound to her face which caused her death. Chrissy had abrasions on her wrists that could have been caused by being tied up and abrasions on the left side of her neck. She had been strangled to death. Based on the marks on Chrissy's neck, Dr. Scott testified she could have been strangled with a necklace she was wearing.

Serologist Daniel Gregonis testified that the blood found on defendant's sock, on the carpet and sheet in his house, and on the inner tube in the trunk of his car was human blood, none of which could have come from defendant. He concluded that the blood was consistent with Teddy's ABO blood type and her serum protein and enzyme types, a profile that appears in 5.4 percent of the population.

Deputy Sheriff Charles Wideen, an arson expert, investigated the fire in defendant's house. He concluded that the fire had started in one of the bedrooms, and that it had been deliberately set by a person

pouring a flammable liquid, like gasoline, on and beneath the bed, and lighting it. In a storage shed on defendant's property, Deputy Wideen found a partially full gasoline can. Deputy Wideen concluded, based on indentations in the dust on the carpet where he found the can, that it had been recently moved.

B. The Defense Case

Defendant presented expert testimony that the bodies of Chrissy and Teddy showed no signs of sexual assault.

Relatives and family members testified about defendant's childhood. Defendant spent his earliest years in a poor section of Denver, Colorado. His father was an alcoholic who had little time for his children. At the age of five, defendant and his mother moved to Texas, but the next year defendant's father came and took him back to Denver. Except for one brief visit, defendant never saw his mother again until after his arrest in this case, when he was 33 years old.

Back in Denver, defendant was raised by his great-aunt, an elderly woman who lived in Goat Hill, a shantytown on the outskirts of Denver. They lived in a shack without electricity, running water, or indoor plumbing. Defendant essentially raised himself. He had little communication with his great-aunt, because she spoke only Spanish and he spoke only English. He became a loner.

When defendant was 11, he and his father moved to California. At the age of 17, lying about his age, he enlisted in the Army, where he remained for the next seven years.

Defendant served three tours of duty in Vietnam. Although the defense offered no witnesses who remembered defendant while he was there, several men who had served in the same units as defendant testified that the units came under sniper and mortar fire in their

encampments and that they suffered casualties when their supply convoys were attacked and when they went on "search and destroy" missions. Defendant was wounded and awarded a Purple Heart. He also received a Combat Infantry Badge for having been under enemy fire. On cross-examination, the prosecutor elicited testimony that defendant had been court-martialed for falling asleep on guard duty, that he had been disciplined for having a Vietnamese woman in his quarters in a village that was off-limits, and that he had misappropriated a truck.

After his release from the Army, defendant moved to Lake Tahoe. He married his stepsister Sharla, and they moved to Vista, a city in San Diego County. They had a son, and defendant got a job as a machinist. Defendant was a hard worker but he remained a loner. Five years later, the family moved to Yucaipa, in San Bernardino County, where defendant got a job with an engineering company. He was fired about a year before the murders in this case because he was unable to adapt to the company's specialized equipment.

Dr. Tom Williams, a psychologist, testified that defendant suffered from post-traumatic stress disorder (PTSD), caused by his war experiences in Vietnam. Dr. Williams based this conclusion on defendant's description of these experiences, which included three particularly traumatic episodes: he shot and killed a man who had attacked him with a grenade, his supply truck ran over a land mine, and he had to load into body bags the bodies of a platoon of American soldiers killed in action. Dr. Williams also relied on the results of two Minnesota Multiphasic Personality Inventory (MMPI) tests, one given by him, the other by Dr. Craig Rath. Williams expressed no opinion as to whether defendant killed Chrissy and Teddy because of PTSD, and the defense offered no evidence that PTSD played any causal role in the killings.

Dr. Harvey Dondershine, a psychology professor at Stanford University who had worked for 11 years at the National Center for Post Traumatic Stress Disorders, testified that PTSD is a recognized form of mental illness and described its characteristics. He had not examined defendant, and he expressed no view on whether defendant suffered from PTSD.

Several correctional officers, counselors, and an administrator testified about defendant's behavior while he was incarcerated at San Quentin during his appeal after his first trial in this case. They described defendant as a respectful, quiet, and thoughtful inmate who stayed out of trouble. He interacted well with other inmates and with staff. Defendant took up art while in prison; his teacher, Eva De Bona, described his work as "highly original" and deserving of gallery or museum exhibition.

C. Prosecution's Rebuttal

The prosecution played to the jury a tape recording of a police interview with defendant on the night the killings occurred. Defendant discussed his whereabouts that day, denied knowing anything about the two missing girls, and denied any knowledge as to the cause of the fire in his house. He said nothing that directly inculpated him in the murders of the girls.

Dr. Jay Ziskin, a psychologist, testified that diagnoses by psychologists and psychiatrists are generally unreliable; that there is controversy in the mental health field as to whether PTSD exists as a distinct mental disorder, and if so what criteria should be used to diagnose it. According to Dr. Ziskin, the answers defendant gave in the MMPI test administered by Dr. Rath did not match a PTSD profile established by prominent psychologists, and his answers in the MMPI test administered by Dr. Williams suggested he was faking his symptoms.

II. TRIAL ISSUES

A. Trial Court's Failure to Grant Defendant's Motion for Mistrial

The defense called San Bernardino Sheriff's Lieutenant Ross Dvorak to testify regarding defendant's demeanor on the night of his arrest. In response to the question, "How would you characterize [defendant's] demeanor?," Dvorak replied that at the beginning of the investigation defendant was "pretty cordial" but "[a]s time went on, it became more and more of a cat and mouse game to the point where [defendant] shut down the interview by saying, 'I want to talk to my attorney.' " Defense counsel made no objection to Dvorak's testimony at the time, but soon afterwards, during a bench conference on an unrelated matter that occurred while the prosecutor was still cross-examining Dvorak, counsel asserted that Dvorak's reference to defendant's invocation of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436) had been improper and should be stricken. The trial court took no action on the matter, and six other witnesses testified that afternoon.

Before testimony resumed the next morning, defendant moved for a mistrial, claiming prejudice from Lieutenant Dvorak's testimony that during the investigation defendant had invoked his *Miranda* rights. The trial court denied the motion, stating: "The time to make an objection was at the time the response came out, if it did prejudice the jury in any way. Frankly, it doesn't." Thereafter, at defendant's request, the court told the jury to disregard the testimony in question, which the court ordered stricken from the record.

Defendant argues that the trial court should have granted his motion for mistrial. He relies on *Doyle v. Ohio* (1976) 426 U.S. 610, which holds that the prosecution may not penalize a defendant for invoking *Miranda* rights during interrogation by using the invocation

against the defendant at trial. The Attorney General asserts that defendant did not preserve the issue for appeal because his objection to the challenged testimony and his request for a mistrial were untimely. For the sake of argument, we assume that defendant's motion for a mistrial was timely. Nevertheless, we find no error.

" 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " (*People v. Hines* (1997) 15 Cal.4th 997, 1038.) Ordinarily, evidence that a suspect has invoked the right to remain silent creates the danger that the jury will draw an impermissible inference of guilt from the testimony. (See generally *United States v. Newman* (9th Cir. 1991) 943 F.2d 1155, 1157.) Here that danger was not present, as defendant's guilt was not in issue in this penalty retrial. Defendant argues that the jury might have inferred from defendant's invocation of his *Miranda* rights that he was acting in a cold and callous manner immediately after the killings, and that he therefore should be sentenced to death. But neither the prosecutor nor Lieutenant Dvorak suggested that the jury should draw this inference. As a result, the trial court did not abuse its discretion when it concluded that any prejudicial effect arising from Lieutenant Dvorak's testimony could be cured by an admonition to the jury to disregard it.

B. Admission of "In Life" Photograph of Murder Victim Teddy Engilman

Over defendant's objection, the trial court admitted a photograph of victim Teddy Engilman taken before her death, ruling that it was relevant to assist the jury in determining the extent of the beatings defendant had inflicted on her. Defendant argues the photograph was

irrelevant and served no purpose other than to generate sympathy for the victim, and it therefore should have been excluded.

The Attorney General contends this issue has not been preserved for appeal because defendant did not object at trial. We disagree; defendant's pretrial objection was sufficient to preserve the issue. (*People v. Morris* (1991) 53 Cal.3d 152, 187-191.) But we find no error. A photograph of a murder victim while alive is relevant at the penalty phase of a capital trial as a "circumstance of the crime," because it portrays the victim as seen by the defendant before the murder. (*People v. Cox* (1991) 53 Cal.3d 618, 688.) Defendant points out that we have repeatedly cautioned about the dangers of admitting photographs of murder victims while alive. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 677; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230; *People v. Poggi* (1988) 45 Cal.3d 306, 323.) In those cases, however, the photographs were admitted at the guilt phase of trial. As we recently explained, they are "generally admissible" when, as here, the prosecutor seeks to introduce them at the penalty phase. (*People v. Carpenter* (1997) 15 Cal.4th 312, 400-401.) Thus, here the admission of the photograph was proper.

Defendant also argues admission of the photograph violated the federal Constitution because it rendered the trial "fundamentally unfair." Because defendant failed to object on this ground at trial, he may not now raise this issue on appeal. In any event, we discern no fundamental unfairness from the trial court's admission of the photograph.

C. Prosecution's Cross-examination Regarding Feigned Mental Illness

As previously mentioned, Dr. Harvey Dondershine testified that PTSD is a recognized form of mental illness, and he described its characteristics. On cross-examination, the prosecutor asked him whether he was familiar with the "Rosenhan study," which showed that psychiatrists can mistakenly diagnose a patient as mentally ill. Dondershine said he knew of the study, and the prosecutor then elicited from him how it had been conducted: eight medical students feigned mental illness to obtain admission to hospital psychiatric wards, but the day after admission each no longer pretended to be mentally ill. Nevertheless, they were incorrectly diagnosed as mentally ill.

Defendant asserts the prosecutor's questions were not permissible cross-examination. He relies on Evidence Code section 721, subdivision (b), which, at the time of defendant's trial, provided that an expert could not be cross-examined regarding the "content or tenor of any . . . technical . . . publication unless: (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or (2) Such publication has been admitted into evidence." (Stats. 1965, ch. 299, § 2, p. 1312.) He contends that here Dr. Dondershine did not rely on the Rosenhan study in forming his opinion and the study was not admitted into evidence. Because defendant did not object to the challenged cross-examination, he has not preserved the issue for appeal. (*People v. Price* (1991) 1 Cal.4th 324, 457.)

Anticipating this conclusion, defendant accuses his counsel of incompetence for not making such an objection. Assuming for the sake of argument that an objection would have been meritorious, defense counsel's decision not to object may have been motivated by legitimate tactical considerations. (See generally *People v. Pope*

(1979) 23 Cal.3d 412, 425 [if "counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed"].) Counsel knew the prosecutor intended to call Dr. Jay Ziskin to testify that psychological diagnoses are not valid or reliable, and he could reasonably assume that Dr. Ziskin would rely on the Rosenhan study in support of this conclusion. Counsel may have decided that it would be better for the defense if the jury learned of the Rosenhan study from defense witness Dr. Dondershine rather than from prosecution witness Dr. Ziskin.

D. Defendant's Loss of Sleep

On the morning of August 1, 1989, the second day of testimony, defense counsel told the trial court that the previous day defendant was left in a holding cell at the courthouse until after midnight and did not return to his cell until 12:30 a.m. The court told counsel that if this happened again it would "correct" the problem. Thereafter, on two separate occasions counsel informed the court that defendant had not been returned to his cell until 10:45 p.m.

Defendant contends that his lack of sleep on these occasions violated his federal constitutional rights to the effective assistance of counsel and to be present at trial. But defendant never asked the trial court to postpone the trial to give him additional time to sleep. As for defense counsel's alleged incompetence for not seeking a continuance to enable defendant to have more rest, counsel may have reasonably believed that defendant was sufficiently rested and no continuance was necessary.

E. Proceedings in Defendant's Absence

During its deliberations, the jury sent a note to the trial court, asking: "Was there any official Medical Diagnosis that [defendant] has PTSD?" Defendant was not present when the court and counsel discussed the question, nor was he there when the court answered the question by telling the jury that the diagnosis of PTSD by defense witness Dr. Williams was the only such diagnosis in the record. Defendant asserts the court violated his federal constitutional right to be personally present during all phases of his trial by conducting these proceedings in his absence. (See *People v. Waidla* (2000) 22 Cal.4th 690, 741-743.)

The Attorney General points out that at trial defense counsel waived defendant's right to be present during the proceedings in question. Defendant responds that the waiver was invalid because he did not personally waive his right to be present. We need not resolve this dispute, because any violation of defendant's right to be present was harmless.

"A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution . . . . (*People v. Jones* [(1991)] 53 Cal.3d [1115,] 1141; *People v. Douglas* (1990) 50 Cal.3d 468, 517.) A defendant, however, 'does not have a right to be present at every hearing held in the course of a trial.' (*People v. Price*, [*supra*,] 1 Cal.4th 324, 407.) A defendant's presence is required if it 'bears a reasonable and substantial relation to his full opportunity to defend against the charges.' (*People v. Freeman* (1994) 8 Cal.4th 450, 511.) The defendant must show that any violation of this right resulted in prejudice or violated the defendant's right to a fair and impartial trial. (*People v. Jackson* (1980) 28 Cal.3d 264, 310.)" (*People v. Hines*, *supra*, 15 Cal.4th at pp. 1038-1039.)

Here, the trial court's answer to the jury's question – that the only diagnosis of PTSD in the record was that made by defense witness Dr. Williams – was correct, and defendant's presence would not have affected that answer. As a result, defendant's presence would not have contributed to the fairness of the procedures, and his absence during the jury's inquiry did not prejudice him or violate his right to a fair and impartial trial. (See *People v. Waidla, supra*, 22 Cal.4th at p. 742.)

F. Failure to Offer Defendant Allocution

Defendant contends the trial court should, on its own initiative, have allowed him at this penalty retrial the opportunity to address the jury "in allocution," that is, without being subject to cross-examination by the prosecutor. He acknowledges that we have repeatedly held there is no right of allocution at the penalty phase of a capital trial. (See, e.g., *People v. Clark* (1993) 5 Cal.4th 950, 1036-1037; *People v. Nicolaus* (1991) 54 Cal.3d 551, 583; *People v. Keenan* (1988) 46 Cal.3d 478, 511.) But he insists that these cases do not address his claim that failure to permit allocution violates the right of a capital defendant to equal protection of the law, because a defendant in a noncapital case may at the time of sentencing address the court without being subject to cross-examination at the time of sentencing. We rejected such a claim in *People v. Clark, supra*, 5 Cal.4th at pages 1036 to 1037, albeit without analysis, merely observing that the defendant in that case had cited no authority in support of the contention.

In any event, defendant's equal protection claim fails at the threshold, because he cannot show that he was denied a right granted to defendants in noncapital cases. Although one decision of the Court of Appeal has held that a noncapital defendant is entitled to allocution as a matter of right (*In re Shannon B.* (1994) 22 Cal.App.4th 1235; but see, contra, *People v. Sanchez* (1977) 72

Cal.App.3d 356, 359; *People v. Wiley* (1976) 57 Cal.App.3d 149, 166; *People v. Cross* (1963) 213 Cal.App.2d 678, 682), no court has held that in a noncapital case a trial court must, on its own initiative, *offer* the defendant allocution. Thus, here the trial court did not violate defendant's right to equal protection when it did not, on its own initiative, make defendant such an offer.

G. Prosecutorial Misconduct

Defendant accuses the prosecution and its witnesses of prejudicial misconduct. He cites six such instances, which we discuss below.

1. Reference to Defendant's Invocation of the Right to Remain Silent

As previously explained (see issue II.A., *ante*), when defendant called Lieutenant Ross Dvorak to testify regarding defendant's demeanor during interrogation, Dvorak mentioned that defendant had ended the interrogation by invoking his right to counsel. Defendant argues that Lieutenant Dvorak's reference to defendant's invocation of his rights constituted misconduct by the *prosecutor*. (See *Doyle v. Ohio, supra*, 426 U.S. 610 [prosecutor's cross-examination of a defendant about his invocation of *Miranda* rights violated due process].) We disagree. The record contains no evidence that the prosecutor was in any way responsible for Dvorak's comment. Defendant points out that a prosecutor must "guard against statements by *his* witnesses containing inadmissible evidence" (*People v. Warren* (1988) 45 Cal.3d 471, 481, italics added), and a prosecutor who believes that a *prosecution* witness may mention an inadmissible matter "must warn the witness to refrain from making such a statement" (*id.* at p. 482). This obligation arises when the witnesses are called by the prosecution. Here, the defense, not the prosecution, called Dvorak to testify.

Defendant also asserts that Lieutenant Dvorak committed misconduct by mentioning defendant's invocation of his right to counsel during interrogation. Any possibility of prejudice was negated when the trial court struck the testimony and told the jury to disregard it.

2. Defendant's Tape-recorded Statement

After defendant presented evidence that he was suffering from PTSD when he killed the two young girls, Teddy and Chrissy, the prosecutor offered into evidence a tape recording of the interrogation of defendant by San Bernardino County Sheriff's detectives on the night of the murders. Defendant said nothing inculpatory during the questioning, but he made some statements that were demonstrably false. Defendant objected to the recording, asserting that the prosecutor intended to use it only to show that he had lied during the interrogation. The prosecutor responded that the recording was admissible to show that defendant was not mentally impaired by PTSD on the night of the killings. The trial court overruled the objection. During closing argument, the prosecutor discussed defendant's lies in the recording. Defendant contends the trial court admitted the recording solely for the limited purpose for which it was offered, and the prosecutor committed misconduct by using it for a different purpose in closing argument: to show that defendant had a bad character because he was a liar.

Because defendant did not at trial object to the prosecutor's argument, he is barred now from raising the issue. (*People v. Price, supra*, 1 Cal.4th at p. 440.) In any event, an objection would have been groundless. As is apparent from the discussion in the preceding paragraph, the trial court did not admit the tape-recorded statements for a limited purpose; therefore, the prosecutor could use them in closing argument for any legally permissible purpose, as he did here. The prosecutor mentioned defendant's lies in the statement twice,

each time for a permissible purpose: first, as evidence that defendant was callous and cold-blooded in his attitude towards the murders shortly after he committed them, casually asking the investigating officers for coffee while lying to them about his knowledge of the young girls' whereabouts; second, as a basis for arguing that defendant had falsely answered questions in the MMPI test on which Dr. Williams relied in concluding that defendant was suffering from PTSD. There was no prosecutorial misconduct.

3. Cross-examination of Defense Expert Williams

Defense witness Dr. Tom Williams, a clinical psychologist and an expert on PTSD, testified that defendant suffered from PTSD. He was not asked, and he expressed no view on, whether the disorder played any role in defendant's commission of the murders.

On cross-examination, the prosecutor asked Dr. Williams a series of questions about defendant's possible motives for committing the crimes. He also asked whether Williams knew that defendant had lied to the sheriff's deputies who questioned him on the night of the murders. Defendant argues these questions were impermissible because they were beyond the scope of Dr. Williams's testimony on direct examination. He asserts: "Under the guise of cross-examining Dr. Williams on his expert opinion, the prosecution was improperly allowed to place before the jury prejudicial evidence and inferences which were not germane to the formation of Williams's expert opinion."

The Attorney General contends defendant waived this issue by failing to object to these questions. After reviewing the record, we conclude that defendant objected to the prosecutor's questions regarding defendant's motives for the murders, but not to the questions regarding his lies to the interrogating officers. Thus, he has

preserved the right to challenge the prosecutor's questions on the former subject, but not the latter.

The prosecutor's questions about motive were proper. Even though Dr. Williams did not explicitly testify that the murders were attributable to PTSD, it was possible that the jury might *infer*, based on his testimony, that PTSD played some role in the killings. As defense counsel said in a discussion in chambers, "I think it is a question for the jury to determine whether or not [defendant] was suffering from PTSD or a flashback or a triggering or something at the time of the homicides." The prosecutor's cross-examination of Dr. Williams about defendant's possible motive for the killings was intended to rebut the inference that they were attributable to PTSD. The questions fell within the subject matter of Dr. Williams's testimony on direct examination and were therefore permissible.

The prosecutor's questions regarding defendant's false statements to the police served a different purpose. Dr. Williams had based his conclusion that defendant suffered from Vietnam-related PTSD on defendant's description of his war experiences in Vietnam and on defendant's answers in tests given by Drs. Williams and Rath. The prosecutor's questions about defendant's false statements tested Dr. Williams's belief in the truthfulness of defendant's account of his Vietnam experiences and his test answers. As a result, any objection to the prosecutor's questions about defendant's lies would have been meritless. (See *People v. Coddington* (July 3, 2000, S008840) ___ Cal.4th ___ [p. 95] ["When . . . psychiatric experts' opinions . . . are based in substantial part on statements made to them by the defendant, inquiry into the basis for the experts' belief that the defendant was honest and their knowledge of past deceitful conduct is permissible"].) Defense counsel was not incompetent for failing to object in this instance.

Finally, defendant raises a claim of prosecutorial misconduct based on the following: On cross-examination, defense witness Dr. Williams testified that he had told defendant that anything defendant said about the murders could be revealed in court. The prosecutor then asked: "Did you explain to him that his lawyers might not ask . . . questions [about the murders], but a prosecutor sure might?" The trial court sustained defendant's objection to the question. Contrary to defendant's claim of prejudice, the question was harmless: it can hardly have come as a shock to the jury to learn that once the prosecutor knew that defendant had discussed the murders with Dr. Williams, he would question Williams in court about the matter.

4. Defendant's Reclassification While in Prison

During the defense's presentation of evidence, defense counsel told the trial court the prosecution might mention that defendant had been disciplined at San Quentin prison when a "shank" (an inmate-made weapon) was found in his cell. He asked that the court hold a hearing under Evidence Code section 402 before permitting the prosecution to introduce evidence about this incident. The prosecutor agreed not to cross-examine witnesses about the incident before resolution of the issue in chambers.

Later that day, before a hearing on the shank incident, defendant called Richard Martinez, a former San Quentin prison employee familiar with defendant's conduct in prison. Martinez testified that defendant was not a threat to other inmates or guards and was classified as a "Grade A" inmate, meaning he did not pose a disciplinary problem. On cross-examination, the prosecutor asked if Martinez had been involved in any disciplinary proceedings involving defendant, and Martinez said he had. The prosecutor then asked the trial court for a conference in chambers.

Outside the jury's presence, defendant moved for a mistrial, complaining that the prosecutor had broken his promise not to bring up the shank incident before an in-chambers resolution. The court heard testimony in chambers from Martinez, who explained he had been involved in a disciplinary proceeding when defendant failed to present himself for a cell count, that he knew of but had not been personally involved in the shank incident, and that as a result of the latter incident defendant had been demoted to a "Grade B" category. Defendant then Martinez then gave testimony that was consistent with the trial court's ruling.

Thereafter, to prevent the jury from speculating about the reasons for the reclassification, defendant offered evidence explaining that a shank had been found in defendant's cell in a location and under circumstances suggesting it might have been placed there by another inmate, without defendant's knowledge. withdrew his motion for mistrial, but still objected to Martinez's being permitted to testify regarding the shank. The trial court ruled that Martinez could testify that defendant had been disciplined for failing to present himself for a head count, and that as a result of another incident defendant had been demoted to Grade B, but that Martinez could not mention the reason for the reclassification.

Defendant now argues the prosecutor's question to Martinez about any disciplinary proceedings against defendant breached his promise not to inquire into the shank incident without a hearing on its admissibility. But the prosecutor did not ask Martinez about the shank incident; he inquired into a matter involving defendant's failure to appear for a head count. There was no prosecutorial misconduct.

Defendant also faults the trial court for permitting the prosecutor to introduce evidence that defendant's disciplinary status had been reclassified from Grade A to Grade B, thereby forcing the defense to

elicit details of the shank incident. Defendant argues that had the court held a hearing concerning the admissibility of the shank incident as evidence in aggravation, it might well have excluded the evidence. He points out that at a later hearing on his motion to modify his death sentence, the trial court noted that the evidence did not show beyond a reasonable doubt that defendant had possessed the shank. We find no error. Defendant presented testimony that he was not a disciplinary problem while in prison. The prosecution was entitled to rebut that mitigating testimony with evidence of disciplinary violations that led to defendant's disciplinary reclassification from Grade A to Grade B, regardless of whether that evidence was independently admissible as evidence in aggravation.

5. Prosecutor's Closing Argument

In closing argument to the jury, the prosecutor commented that defendant's "brutality and callousness" during the killings of the two young girls was "equal, if not surpassed, by the defendant's conduct afterwards." Pointing out that defendant had thrown the bodies in a dumpster like "two pieces of garbage," the prosecutor said: "This is what aggravation is all about."

Defendant contends this argument was misconduct because it asked the jury to consider defendant's lack of remorse for the killings as a factor in aggravation. (See *People v. Champion* (1995) 9 Cal.4th 879, 943 [prosecutor may discuss subject of remorse but may not argue lack of remorse as aggravating factor].) He further asserts that the prosecutor's comment violated his Fifth Amendment privilege against self-incrimination, because, in his view, the jury was likely to regard it as a comment on defendant's failure to testify and to express remorse. (See generally *Griffin v. California* (1965) 380 U.S. 609 [prosecutor may not comment on a defendant's failure to testify].) Anticipating our rejection of this argument on the ground

that his counsel did not object at trial to the prosecutor's argument (*People v. Price, supra,* 1 Cal.4th at p. 440), defendant claims the failure to do so constituted ineffective assistance of counsel.

The prosecutor's argument was proper. Defendant's callous method of disposing of the girls' bodies in a dumpster was a circumstance of the murders that the jury could properly consider in aggravation (§ 190.3, factor (a)), and the prosecutor was entitled to argue that the aggravated circumstances of the crime warranted the death penalty. Nor do we find anything in the prosecutor's remarks that could be construed as a commentary on defendant's failure to testify. Thus, an objection would have been fruitless.

H. Jury Instruction Issues

1. Instructions Defining Extenuating Circumstances

A standard instruction (CALJIC No. 8.88) told the jury how to weigh the aggravating and mitigating evidence offered at the penalty phase. The instruction defined a mitigating circumstance as "any fact, condition or event which, as such, does not constitute a justification or excuse for the crime in question, but may be considered as an *extenuating circumstance* in determining the appropriateness of the death penalty." (Italics added.) During its deliberations, the jury asked, "We, the jury, in the above entitled action, request the following: Exact definition of extenuating circumstances." After consulting with counsel, the trial court gave this written answer: "Extenuating circumstances: Such as render a crime less aggravated, heinous, or reprehensible than it would otherwise be, or tend to lessen its guilt. Such circumstances may ordinarily be shown in order to reduce the punishment." "Extenuation: That which renders a crime less heinous than it would be without it. It is opposed to aggravation." The source for these two

definitions was Black's Law Dictionary. (See Black's Law Dict. (5th ed. 1979) p. 524.)

Defendant now challenges the definitions given by the trial court in answer to the jury's question. The Attorney General argues that he is barred from doing so by the doctrine of invited error, noting that the trial court told the jury that "*we* decided on the definitions" (italics added), referring to the court, the prosecutor and defense counsel, and the prosecutor later stated (without contradiction from the defense) that "both parties approved" the court's answer.

The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a "conscious and deliberate tactical choice" to "request" the instruction. (*People v. Wader* (1993) 5 Cal.4th 610, 658; see also *People v. Cain* (1995) 10 Cal.4th 1, 38, fn. 14; *People v. Cooper* (1991) 53 Cal.3d 771, 831.) Our cases do not address, however, whether a defendant's approval of a court's instruction, as occurred here, is equivalent to a request. It is also unclear from the record whether in this case defendant's approval of the trial court's definitions of "extenuation" and "extenuating circumstances" was the result of a conscious and deliberate tactical choice. But we need not decide whether the doctrine of invited error bars defendant's challenge, because, as we shall explain, we find that the court properly answered the jury's question.

Defendant complains that the trial court's definitions of "extenuation" and "extenuating circumstances" were inaccurate because they did not tell the jury that mitigating evidence not directly related to the crime itself, such as defendant's character, his history, and his accomplishments, could be considered in determining punishment. But the jurors' question did not indicate that they were confused about whether they could consider defendant's mitigating evidence; they merely asked the trial court to define the term

"extenuating circumstances." The jury had no reason to be confused about whether it could consider defendant's mitigating evidence, for the trial court had instructed the jury that among the factors to be considered in weighing the evidence was this: "Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime *and* any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (Italics added.) Thus, the jury was aware it could consider defendant's mitigating evidence even if it did not believe that the evidence extenuated the gravity of the murders he committed.

Defendant argues the trial court's definition of "extenuation" was wrong because, by stating that "extenuation" was "opposed to aggravation," the court effectively defined "mitigation" as "the opposite of aggravation." This juxtaposition, he claims, is inaccurate because mitigation is "open-ended" (that is, the jury is free to consider any evidence to be mitigating), while the jury may consider evidence as aggravating only if it is relevant to an aggravating factor listed in section 190.3. We are not persuaded that the court's definition of "extenuation" would have caused any confusion by the jury as to whether it could consider aggravating evidence not mentioned in section 190.3. The trial court gave the jury a modified version of CALJIC No. 8.85, a standard instruction describing the aggravating and mitigating factors the jury could consider in deciding whether to impose the death penalty. We find nothing in the court's definition of the word "extenuation" that would have caused the jury to disregard this instruction.

2. Trial Court's Failure to Instruct on Sympathy

Defendant faults the trial court for not instructing, on its own initiative, that the jury could consider sympathy for defendant as a mitigating circumstance. We have, however, repeatedly held that such an instruction need not be given at the penalty phase of a capital trial (see, e.g., *People v. Champion, supra*, 9 Cal.4th at p. 943; *People v. Clark* (1992) 3 Cal.4th 41, 163), and we see no reason to reconsider that holding. Moreover, here the trial court implied that the jury could consider sympathy for defendant when it instructed the jurors that they could consider "any *sympathetic* or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial" (italics added), and that the jurors were free to "assign whatever moral or *sympathetic* value" (italics added) they deemed appropriate to the aggravating and mitigating factors they were permitted to consider.

3. Trial Court's Failure to Instruct on Defendant's Lack of a Violent Record

The trial court instructed the jurors that in determining whether to impose the death penalty, they should "consider, take into account and be guided by the following factors, if applicable: [¶] . . . . [¶] (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the express or implied threat to use force or violence." Defendant argues this instruction was inaccurate because it did not expressly tell the jurors that they should regard section 190.3, factor (b) as mitigating if they found that aside from the murders in this case defendant had not engaged in violent criminal conduct. According to defendant, the jury was likely to infer from the court's instruction that lack of a history of violence was a neutral rather than a mitigating factor.

The Attorney General contends that any error was invited by defendant because he helped the trial court in drafting the instruction in question. We find no invited error. Defense counsel did not participate in drafting the instruction, he merely objected to those portions of the instruction that would allow the jury to conclude, based on the evidence that a shank had been found in defendant's prison cell, that defendant had engaged in conduct involving the threat to employ violence. But the trial court's instruction was proper. "We have repeatedly held that 'trial courts are not required to identify particular sentencing factors as aggravating or mitigating and that the 1978 death penalty law is constitutional despite the absence of such a requirement.' " (*People v. Davenport* (1995) 11 Cal.4th 1171, 1229; see also *People v. Earp* (1999) 20 Cal.4th 826, 899; *People v. Frye* (1998) 18 Cal.4th 894, 1026-1027; *People v. Howard* (1992) 1 Cal.4th 1132, 1196.) Defendant asserts these cases are distinguishable because in each the defendant contended that *all* of the factors should be labeled as aggravating or mitigating, while here he claims only that one particular factor should have been so labeled. We find no distinction: if the trial court need not label all the enumerated factors as aggravating or mitigating, it necessarily follows that it need not identify any particular factor as aggravating or mitigating.

4. Instructions on Factors in Section 190.3

As previously mentioned, the trial court gave a modified version of CALJIC No. 8.85, a standard instruction describing the section 190.3 factors the jury should consider in deciding whether to impose the death penalty. Defendant argues this instruction was deficient in several respects. We are not persuaded.

First, defendant complains the trial court told the jury that one factor it could consider in deciding whether to impose the death penalty was based on section 190.3, factor (a), "the circumstances of

the crime of which the defendant was convicted in the present proceeding . . . ." According to defendant, the prosecutor introduced "a vast array of irrelevant evidence" as part of the circumstances of the crimes: that Chrissy lived with her family in Yucaipa on the day of the murder, that Teddy lived with her family nearby, that Chrissy's father told the girls they could go to the park, that Teddy's brother had shown Teddy a shortcut to the park, and that the necklace defendant used to strangle Chrissy had been given to her by her mother as a present shortly before her death.

Defendant contends the evidence just described had no bearing on his moral culpability and the jury should not have considered it in determining whether to impose the death penalty. He asserts the court's instruction that the jury could consider the "circumstances of the crime" was unconstitutionally vague, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and the parallel sections of our state Constitution, because it allowed the jury to consider this allegedly irrelevant evidence.

We disagree. As both the United States Supreme Court and this court have said, an instruction that the jury may consider the circumstances of the offense at the penalty phase of a capital case is not unconstitutionally vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 977-979; *People v. Hawkins* (1995) 10 Cal.4th 920, 964; *People v. Cain, supra,* 10 Cal.4th 1, 68.) We trust that the jury, assisted by the arguments of counsel, were able to determine which facts were relevant to the penalty determination and which were not. To the extent defendant argues that facts relating to the victims can never be relevant to penalty, he is wrong. "A State may legitimately conclude that evidence about the victim . . . is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Payne v. Tennessee* (1991) 501 U.S. 808, 827; see also, *People v. Clark* (1993) 5 Cal.4th 950, 1033.)

Defendant also criticizes the trial court's instruction, as part of CALJIC No. 8.85, that the jury could consider section 190.3, factor (b) in deciding whether to impose the death penalty.[6] Defendant claims this portion of the instruction was unconstitutionally vague and ambiguous because it permitted the jury to consider in aggravation the evidence that defendant at one time had a shank in his prison cell. Defendant notes that the shank was found in a location where it could have been planted by another inmate, and that at the hearing on defendant's motion for modification of the death sentence, the trial court found that the evidence did not show beyond a reasonable doubt he had been in possession of the shank.

The United States Supreme Court has already rejected the contention, now being made by defendant, that factor (b) of section 190.3 in our capital sentencing scheme is unconstitutionally vague. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 977-980.) Nor was the trial court's factor (b) instruction erroneous for permitting the jury to consider defendant's possible possession of a shank while in prison. The court correctly instructed the jurors they should consider this evidence only if they found beyond a reasonable doubt he had indeed possessed it. We assume the jurors obeyed the court's instruction.

Also included in CALJIC No. 8.85 was factor (d): "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Defendant

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[6] Section 190.3, factor (b) states that at the penalty phase a jury may consider "[t]he presence or absence of criminal activity by the defendant which involved *the use or attempted use of force or violence or* the express or implied threat to use force or violence." (Italics added.) The trial court's instruction in this case omitted the italicized words. Defendant does not contend the omission was erroneous.

argues this portion of the instruction (as well as section 190.3, factor *(d), on which it is based) was constitutionally deficient because (1)* it did not tell the jury whether factor (d) was an aggravating or a mitigating factor; (2) the word "extreme," as used in the instruction, was unconstitutionally vague; (3) the word "extreme" prevented the jury from considering mental or emotional disturbances that are not extreme. We have in the past rejected each of these contentions. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1266-1268; *People v. Holt* (1997) 15 Cal.4th 619, 698; *People v. Ashmus* (1991) 54 Cal.3d 932, 1001-1002.)

Defendant further contends that CALJIC No. 8.85 and section 190.3 (on which the instruction is based) are unconstitutionally vague for various reasons: "[T]hey do not limit the jury to consideration of only the listed factors in aggravation; they fail to guide the jury's discretion; they permit the prosecutor to argue non-statutory aggravating evidence as aggravating evidence; and they allow the penalty process to proceed in an arbitrary, capricious, death-biased and unreviewable manner . . . ." Not so. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 971-973; *People v. Millwee* (1998) 18 Cal.4th 96, 163-164; *People v. Musselwhite, supra*, 17 Cal.4th at pp. 1266-1268; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 470-477.)

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant asserts he was denied the effective assistance of counsel, based on various acts and omissions by his attorney.

"To prevail on a claim of ineffective assistance of counsel, defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.' " (*People v. Hart* (1999) 20 Cal.4th 546, 623.) Prejudice occurs only if the record demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) "When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal." (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

With these principles in mind, we review defendant's claims of ineffective assistance of counsel.

A. Defense Counsel's Failure to Request Special Instructions

According to defendant, counsel was incompetent for failing to request special instructions on a variety of subjects. We discuss each in turn.

As previously discussed, the trial court gave a standard instruction, CALJIC No. 8.85, describing the factors the jury could consider in its penalty deliberations, including the following: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." Defendant contends his counsel should have asked for a pinpoint instruction to explain to the jury the scope of this part of CALJIC No. 8.85. Defendant suggests an instruction such as the one given in *People v. Noguera* (1992) 4 Cal.4th 599, 647, where the trial court told the jury the mitigating factors listed in CALJIC No. 8.85 were "only examples" and the jury could consider "other circumstances as reasons for not imposing the death penalty," or an instruction drawing the jury's attention to

defendant's background, history, and character, his capabilities or lack of same, and his accomplishments or lack of same, as was given by the court in *People v. McLain* (1988) 46 Cal.3d 97, 114. The trial court was under no obligation to give such an instruction, which would have been essentially duplicative of CALJIC No. 8.85, and counsel need not request unnecessary and duplicative instructions.

Defendant faults his counsel for not requesting an instruction drawing the jury's attention to categories of mitigating evidence offered by the defense, such as defendant's deprived childhood, his military service, his artistic abilities, his role as a father, and his behavior in prison. As we have held in the past, instructions of this type are "argumentative," and therefore should not be given, because they " 'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " (*People v. Hines, supra*, 15 Cal.4th at pp. 1067-1068.)

Defendant asserts that in the absence of special instructions of the kind described above, CALJIC No. 8.85 was misleading, confusing and likely to lead to an arbitrary finding of death. To the contrary. We have held that this instruction correctly describes the jury's role in evaluating evidence presented at the penalty phase. (*People v. Musselwhite, supra*, 17 Cal.4th at pp. 1266-1268.) Counsel was not ineffective for not requesting additional instructions elaborating upon CALJIC No. 8.85.

Defendant argues defense counsel should have sought an instruction that the jury could consider in mitigation the fact, if true, that the killings of the two young girls were not premeditated. According to defendant, we approved such an instruction in *People v. Bonillas* (1989) 48 Cal.3d 757, 792. We did not. The trial court in *Bonillas* gave such an instruction, but we expressed no view as to whether the court should have given it. Moreover in *Bonillas*, unlike this case, the jury made no determination at the guilt phase that the

murder the defendant had committed was premeditated, because the murder conviction there was based on the felony-murder rule. Here, by contrast, the guilt phase jury necessarily found premeditation when it convicted defendant of first degree murder. Assuming for the sake of argument that the instruction the trial court gave in *Bonillas* was appropriate there, it would have been improper here. Defendant also makes the closely related claim that counsel should have requested an instruction that if the jury had lingering doubts about premeditation, these doubts could be the basis for sentencing defendant to life in prison without possibility of parole. Even if such an instruction would have been proper, defense counsel may have had tactical reasons not to request it, as we explain in part III.D., *post.*

Defendant faults counsel for failing to request an instruction that the jury could consider his lack of a history of violence and his lack of prior felony convictions as factors in mitigation. The trial court, however, gave the jury a standard instruction, CALJIC No. 8.85, stating that it could consider the "presence *or absence* of criminal activity by the defendant . . . which involved the express or implied threat to use force or violence," and the "presence *or absence* of any prior felony conviction . . . ." (Italics added.) This instruction told the jury that if it found an absence of evidence that defendant had a history of violent criminal activity or prior felony convictions, it could consider that fact in mitigation. Defense counsel cannot be faulted for not requesting an instruction that would duplicate the one given by the court.

Defendant argues the trial court's instruction mentioned in the preceding paragraph was inadequate because it merely stated that the jury "shall consider, take into account and be guided by" the presence or absence of a violent criminal history and prior felony convictions, and that counsel should have asked for an instruction that the jury must consider those factors. To the extent there is a difference between the instruction given by the trial court and that proposed by

defendant, the trial court's instruction more accurately describes the jury's role in evaluating the aggravating and mitigating circumstances. (See § 190.3 ["In determining the penalty, the trier of fact shall take into account any of the [relevant] factors . . . ."].)

The trial court told the jury to "determine . . . which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." Defendant notes that this instruction did not expressly say that one mitigating factor is sufficient to outweigh all aggravating factors, and he faults counsel for not requesting a clarifying instruction. But such a clarifying instruction would have been argumentative unless it also told the jury that one aggravating factor is sufficient to outweigh all mitigating factors. Counsel may reasonably have concluded that not only was such clarification unnecessary, but it would have done more harm than good, because it would have supported the prosecutor's argument that one aggravating factor (the circumstances of the crime) outweighed all of the factors in mitigation.

B. Defense Counsel's Elicitation of Prejudicial Evidence

As previously explained (see pts. II.A. and II.G.1, *ante*), Lieutenant Ross Dvorak, called by the defense to testify regarding defendant's demeanor on the night of his arrest, mentioned that defendant had ended his interrogation by invoking his right to counsel. Defendant asserts his counsel was ineffective because he did not object to the testimony and did not ask that the statements be stricken. Defense counsel did, however, object to the testimony in a conference in chambers while Dvorak was still on the stand, explaining that he "hesitated to do it before the jury because it clangs the bell again." The next day, the trial court told the jury at defense counsel's request to disregard Dvorak's comment because it had been stricken from the record. Defendant also contends counsel should

have objected sooner. Even if he should have, there is not a reasonable probability that the trial's outcome would have been different if counsel had objected and sought an admonition immediately after Dvorak's comment regarding defendant's request for counsel, instead of, as counsel did, asking in chambers that the comment be stricken.

Defendant faults counsel for not seeking to exclude certain testimony by Lieutenant Dvorak. After Dvorak mentioned that defendant had invoked his right to counsel, defense counsel asked if defendant had been calm during the interrogation. Dvorak replied that defendant was "[m]aybe a little too calm." When counsel asked Dvorak what he meant, Dvorak replied that defendant had been playing "cat and mouse," his answers had been "self-serving," and he had been "pretending he didn't understand some of our questions." It is this testimony that defendant insists his counsel should have asked the trial court to exclude. This testimony, however, was responsive to the question asked, so a motion to strike the testimony would not have been well taken. In any event, any conceivable incompetence of counsel in this regard was harmless, because a tape recording of defendant's interrogation was played to the jury, which could draw its own conclusions as to whether he had been playing a cat-and-mouse game or giving self-serving answers during the interrogation.

C. Defense Counsel's Failure to Object to Prosecutor's Questions

Defendant argues his counsel was ineffective on five occasions for not objecting to certain questions by the prosecutor. We disagree, and discuss each instance below.

1. Defendant asserts counsel should have objected to testimony that on the day Chrissy and Teddy were killed, they were playing at

Chrissy's house and asked Chrissy's father for permission to go to the park. He claims this evidence was irrelevant and "erroneously allowed [the prosecution] to present to the jury a picture of the victims as two playful children who were innocently engaged in a trip to the local park." That defendant killed "two playful children who were innocently engaged in a trip to the local park" was a circumstance of the murders and was therefore admissible. (See generally *People v. Edwards* (1991) 54 Cal.3d 787, 833 [A circumstance of the crime is one " 'which surrounds materially, morally, or logically' the crime."].) Thus, an objection by defense counsel to the testimony in question would have been unavailing. "Counsel may not be deemed incompetent for failure to make meritless objections." (*People v. Coddington, supra*, ___ Cal.4th at p. ___ [p. 112].)

2. We reject defendant's contention that counsel should have objected when, after the defense introduced evidence that defendant had participated in the condemned workers program at San Quentin prison, the prosecution elicited testimony that the program had been terminated because some workers in the program had illegally passed items to other inmates. Defense witnesses testified that defendant never violated any rules while he was a member of the program. Counsel may reasonably have concluded that evidence of other inmates violating the rules of the program was favorable to the defense, when contrasted to defendant's obedience of those rules.

3. Defendant contends counsel should have objected when, after defendant offered evidence that he had served three tours of duty in Vietnam, where he was awarded a Purple Heart and a Combat Infantry Badge, the prosecutor elicited testimony that he had been court-martialed for falling asleep on guard duty, had been disciplined for having a Vietnamese woman in his quarters in a village that was off-limits, and had misappropriated a truck. According to defendant, he introduced evidence of his military service in Vietnam for the

primary purpose of showing that he suffered from PTSD, and evidence of his misdeeds while in the military was irrelevant to this purpose and therefore inadmissible. But defendant also relied on his service in Vietnam to show that, as mentioned elsewhere in his brief, he "had served his country above and beyond the call of duty in war" and that his "service for his country in Vietnam was both lengthy and, for the most part, exemplary." Defense counsel stressed this point in closing argument: "We know that Sonny Lucero did serve his country. He did receive a Purple Heart and other ribbons." The prosecution was entitled to reduce the mitigating impact of the evidence that defendant had served three tours of duty in Vietnam and was awarded two medals by showing that his conduct while serving in Vietnam was not exemplary.

4. Defendant characterizes as irrelevant the testimony of Chrissy's father that a necklace Chrissy wore when she died was a present from her mother. Dr. Harry Scott, who conducted the autopsy, testified that Chrissy was strangled, possibly by a necklace. Chrissy's father identified a necklace that was introduced into evidence as the one Chrissy had been wearing the day she died. Thus, his testimony that the necklace was a present from Chrissy's mother was relevant to show his familiarity with the necklace, which strengthened the reliability of his identification of the necklace as the one Chrissy had worn.

5. Defendant complains about counsel's lack of an objection when, after defense witness Isabel Rivera asked the jury to spare defendant's life, the prosecutor asked Rivera whether she had met the victims or knew their names, and whether she knew how they had died, questions to which Rivera gave negative answers. According to defendant, the prosecutor's questions were rhetorical, argumentative, and beyond the scope of direct examination. Defense counsel, however, had no basis for objection. The prosecutor was entitled to ask questions designed to show that Rivera's belief that

defendant's life should be saved did not take into account the circumstances surrounding the murder, because she was unfamiliar with all of the facts of the case. An objection by defense counsel would not have been appropriate.

Defendant also faults counsel for not objecting to three comments by the prosecutor in closing argument. We disagree. In each instance, the prosecutor's argument was proper.

1. In closing argument, the prosecutor told the jury: "[Y]ou sit in this case only as *the conscience of the community.* [¶] And by your decision in this case, you will tell the defendant . . . what you think about his conduct on April the 12th, 1980." (Italics added.) Defendant argues this statement had the effect of diminishing the jurors' sense of personal responsibility for their decision whether to impose the death penalty, by suggesting that jurors should make the penalty determination based on what they thought the community would regard as an appropriate punishment, rather than what the jurors themselves regarded as appropriate. The prosecutor, however, never suggested that the jury should abrogate its responsibility to personally determine whether death was the appropriate penalty. It was proper for the prosecutor to describe the jurors as the "conscience of the community." (*People v. Jones* (1997) 15 Cal.4th 119, 185-186; see also *People v. Lang* (1989) 49 Cal.3d 991, 1041.)

Inapposite is defendant's reliance on *United States v. Koon* (9th Cir. 1994) 34 F.3d 1416 (revd. in part on other grounds *sub nom. Koon v. U.S.* (1996) 518 U.S. 81). There, the federal appellate court held: "An appeal to the jury to be the conscience of the community is not impermissible unless it is 'specifically designed to inflame the jury.' " (*Koon, supra,* 34 F.3d at p. 1444.) In this case, when the prosecutor's statement is considered in context, it is clear that it was intended not to inflame the jurors but only to remind them of their role in the judicial process. We find no error.

2. In closing argument, the prosecutor told the jury: "You also know from the testimony of a number of people in [defendant's] unit, Smallwood, Noel, Painter, Sharp and Williams that people that had the same type of experience in Vietnam did not turn out like the defendant, did not end up like the defendant." Defendant contends that by asking the jury to compare him to others who had allegedly similar life experiences, the prosecutor violated his right to individualized sentencing, which the Eighth Amendment requires in capital cases. He argues that many of the others may not have had his experience of a deprived childhood, and he faults counsel for not objecting. When, as here, a defendant asserts that the death penalty should not be imposed because the defendant has experienced hardship, the prosecutor may properly point out that others with similar experiences did not commit murder. There was no reason for counsel to object.

3. Defendant also complains about counsel's lack of objection to the prosecutor's comment in closing argument that "going to Vietnam and having bad experiences and returning to this country and remembering them, that does not give anyone a blank check to commit murder," adding, "you can't find the answer to this crime" in defendant's deprived childhood. The prosecutor did no more than urge the jury to discount defendant's mitigating evidence. This was proper (see *People v. Hamilton* (1989) 48 Cal.3d 1142); an objection would have been futile.

D. Defense Counsel's Failure to Argue Lingering Doubt

Defendant contends his trial counsel was incompetent for not asking the jury to spare defendant's life because of a "lingering doubt" about his guilt, and for not requesting the trial court to instruct the jury that lingering doubt could be a mitigating circumstance.

Defendant does not dispute that the evidence that he killed the two young girls was overwhelming, nor does he suggest that his counsel should have argued there was a lingering doubt about his identity as the killer. Rather, he contends the jury could have had a lingering doubt as to whether he killed the two girls with premeditation and deliberation, without which he would have been guilty only of second rather than first degree murder. (§ 189.)

The record does not reveal why defense counsel did not argue lingering doubt or request an instruction on it. Counsel may have had tactical reasons. Although the jury might have had a lingering doubt as to whether defendant acted with premeditation when he committed the *first* of the two murders, it was unlikely to have had such a doubt as to whether he premeditated before committing the *second* murder.[7] Thus, defense counsel may have decided that it would be better to say as little as possible about the murders and to focus instead on defendant's service in Vietnam and his deprived childhood. (See generally *People v. Hawkins, supra,* 10 Cal.4th 920, 968.)

E. Cumulative Effect of Errors

Defendant asserts the cumulative effect of counsel's alleged errors and omissions resulted in prejudice sufficient to undermine confidence in the outcome of this case, and we should therefore reverse the judgment of death. As we have explained, in each instance defendant has failed to show that counsel's performance was deficient. Therefore, defendant's claim of cumulative prejudice must also fail.

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[7] Defendant was eligible for the death penalty so long as at least one of the two murders was premeditated. (§ 190.2, subd. (a)(3).)

IV. MISCELLANEOUS ISSUES

A. Defense Motion for Modification of Death Verdict

Defendant argues the trial court committed six prejudicial errors in denying his motion to modify the jury's verdict of death. (§ 190.4, subd. (e).) There was no prejudicial error, as discussed below.

The trial court noted that at the penalty phase the defense had offered evidence that defendant had "a physically and emotionally deprived childhood"; that he "served, with some major exceptions, well as a soldier in the service of his country"; that he had "done well . . . on death row"; and that he "has developed and shows some artistic ability." But the trial court concluded that "none of these factors offered in mitigation *extenuate* the defendant's unexplained and totally without reason homicidal conduct as evidenced by the circumstances surrounding the killing of totally innocent children." (Italics added.)

According to defendant, the trial court here erroneously believed that it could not consider his mitigating evidence because that evidence did not extenuate the murders he committed. We recently rejected a similar claim in *People v. Williams* (1997) 16 Cal.4th 153. There, the trial court, after reviewing the defendant's mitigating evidence at the penalty phase of his capital trial, commented that this evidence did not "extenuate the gravity of the crime" the defendant had committed. (*Id.* at p. 281.) We rejected the defendant's contention that the trial court had failed to consider his evidence in mitigation. We pointed out that the trial court had accurately instructed the jury that it could consider all of the defendant's mitigating evidence, and we concluded that the court's comments showed its consideration of that evidence in ruling on the defendant's modification motion. (*Id.* at pp. 281-282.)

As in *People v. Williams, supra*, 16 Cal.4th 153, the trial court's comments here do not demonstrate a belief that it could not consider defendant's evidence in mitigation. As in *Williams*, the court here instructed the jury to consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial," and it is reasonable to assume the court followed its own instruction when it ruled on defendant's motion for modification of the death verdict. In its ruling, the court described defendant's evidence in some detail, and it never said that it would not consider this evidence or that this evidence was not mitigating. In context, the trial court's comment that defendant's evidence in mitigation did not "extenuate" the murders of the two young girls merely reflected its view that the circumstances of the murders were so egregious as to warrant the death penalty notwithstanding the evidence in mitigation. Nothing before us indicates that the trial court was unaware of its duty to consider defendant's mitigating evidence.

Defendant next contends the trial court "double counted" the two murders as both a special circumstance and as an aggravating circumstance of the crime. (*People v. Melton* (1988) 44 Cal.3d 713, 765-768 [holding double counting improper]; but see *People v. Millwee, supra*, 18 Cal.4th at p. 164, fn. 35 [limiting *Melton*'s holding].) As support, he cites this comment by the trial court: "The circumstances of the crime of which the defendant stands convicted and the existence of the special circumstance found to be true substantially outweigh . . . the factors in mitigation." We perceive no double counting. The trial court's comments simply expressed its view that the mitigating evidence was substantially outweighed by the evidence pertaining to a statutory aggravating factor – "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . ." (§ 190.3, factor (a).)

In explaining the reasons for its denial of defendant's modification motion, the trial court said that the victims "were two young girls . . . who constituted absolutely no threat to the defendant, who were respectively killed by beating and strangulation, which could only evidence a deliberate intent to kill in the most *heinous* manner." (Italics added.) Seizing on this comment, defendant argues that the trial court erred by considering the "heinous" nature of the crimes as a factor in aggravation. He points out that the United Supreme Court has held that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance is unconstitutionally vague, as it does not offer the jury sufficient guidance in deciding whether to impose the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364.) But the aggravating circumstance addressed in *Maynard* was one that determined eligibility for the death penalty, which requires greater precision than the factors that govern the sentence-selection process, at issue here. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 971-975; *People v. Bacigalupo, supra*, 6 Cal.4th at pp. 474-478.) In any event, the trial court merely used the word "heinous" in passing, as part of its explanation why it found the circumstances of the offense an aggravating factor. It did not find that the heinousness of the murders was a separate aggravating factor.

Defendant claims the trial court did not know what standard to apply in ruling on defendant's motion to modify the death verdict. He points to this comment by the court: "[T]he Court finds that the jury's finding at the trial and the verdict reached, that the aggravating circumstances substantially outweigh the mitigating circumstances, are *not necessarily* contrary to the law or evidence presented during this penalty trial." (Italics added.) Defendant contends this comment reflects the trial court's mistaken belief that modification was proper only if the verdict was "necessarily" contrary to the law or evidence. But at the outset of the modification hearing the court accurately described its statutory obligations. And at the end of the hearing the court concluded, "considering all of the evidence, the Court's

assessment is that the factors in aggravation beyond reasonable doubt outweigh those in mitigation and that the finding by the jury is neither contrary to law or evidence." This statement indicates a standard *more favorable* to defendant than the law required, because the trial court did not have to reach this conclusion beyond a reasonable doubt. In our view, notwithstanding its imprecise language, the court applied the proper standard, independently reweighing the aggravating and mitigating evidence to determine that the weight of the evidence supported the jury's verdict of death. (See generally *People v. Espinosa* (1992) 3 Cal.4th 806, 830.)

The trial court, while commenting on defendant's evidence in mitigation, said that the method defendant chose to dispose of the bodies showed that he had no remorse for the crimes. Defendant argues the trial court erroneously considered his lack of remorse after the murders as a factor in aggravation. The trier of fact may properly consider remorse in determining penalty, so long as it does not treat lack of remorse as a separate aggravating factor. (*People v. Ervin* (2000) 22 Cal.4th 48, 103; *People v. Champion, supra*, 9 Cal.4th at p. 943.) Here, the trial court's comment shows only that it found no mitigating evidence that defendant showed remorse for killing the young girls. It did not treat lack of remorse as a separate factor in aggravation.

Finally, defendant contends the trial court improperly failed to consider the cumulative weight of the factors in mitigation, instead weighing each separately against all of the evidence in aggravation. We disagree. After carefully reviewing the trial court's explanation of its reasons for its denial of defendant's modification motion, we find no evidence that the trial court considered the mitigating factors in piecemeal fashion.

In sum, the trial court properly denied defendant's motion for modification of the jury's death verdict.

B. Effect of Passage of Three Strikes Law

Defendant contends the "Three Strikes" law (§ 667, subds. (b)-(i)) abolished the death penalty for those defendants convicted of murder with special circumstances and having one or more prior convictions for serious or violent felonies. Although defendant himself does not fall into this category, he argues that if the death penalty may not be imposed on those with prior serious or violent felonies, to impose the death penalty on defendants with no such convictions, such as himself, would violate equal protection principles. We have held, however, that the Three Strikes law does not abolish the death penalty for those with prior convictions for serious or violent felonies. (*People v. Alvarez* (1996) 14 Cal.4th 155, 246-247; see also *People v. Williams* (1995) 40 Cal.App.4th 446, 457-458.) It therefore follows that imposition of the death penalty on those who have no such convictions does not violate equal protection. Defendant argues that our opinion in *Alvarez* ignored subdivisions (c) and (f)(1) of section 667, each of which states that the penalties specified by the Three Strikes law, which do not include death, shall be applied "[n]otwithstanding any other law . . . ." Those provisions, however, do not override subdivision (e) of section 667, which states that the increased penalties called for by the Three Strikes law shall be imposed "in addition to any other enhancement or punishment provisions which may apply . . . ."

C. Proportionality Review

Defendant asks us to invalidate his death sentence on the ground it was not proportional to his moral culpability. He points to his deprived childhood, his lack of a criminal record, and his military service during the Vietnam war. He also stresses the weakness of the evidence that the murders were premeditated, noting that in the appeal from his first trial we described the evidence of premeditation as "far from overwhelming," although we found it sufficient to

support defendant's murder convictions. (*People v. Lucero, supra,* 44 Cal.3d at p. 1020.)

" 'The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution prohibits the imposition of a penalty that is disproportionate to the defendant's "personal responsibility and moral guilt." [Citations.] Article I, section 17 of the California Constitution separately and independently lays down the same prohibition.' " (*People v. Marshall* (1990) 50 Cal.3d 907, 938; see also *People v. Padilla* (1995) 11 Cal.4th 891, 961-962.) To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) If the penalty imposed is "grossly disproportionate to the defendant's individual culpability" (*ibid.*), so that the punishment " ' "shocks the conscience and offends fundamental notions of human dignity" ' " (*People v. Cox, supra,* 53 Cal.3d at p. 690), the court must invalidate the sentence as unconstitutional.

Here, defendant, acting alone, brutally killed two innocent and defenseless children by strangling one with the necklace she was wearing and by striking the other in the head with blows so hard that they knocked out three of her teeth and fractured her skull in several places. The record contains no explanation for these horrific deeds. Although defendant offered some evidence he suffered from PTSD when he killed the girls, there was no evidence the disorder played any role in the killings. Based on these facts, the punishment in this case is not "grossly disproportionate to the defendant's individual

culpability" (*People v. Dillon, supra*, 34 Cal.3d at p. 479), nor does it " ' "shock[] the conscience and offend[] fundamental notions of human dignity." ' " (*People v. Cox, supra*, 53 Cal.3d at p. 690.)

D. Constitutionality of California's Death Penalty Statute

Defendant contends that California's death penalty scheme fails, either in theory or in practice, to sufficiently narrow the class of offenders eligible for the death penalty, either in theory or in practice, and therefore violates the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Assuming for the sake of argument that defendant may raise this claim following a penalty retrial (see *People v. Davenport, supra*, 11 Cal.4th at p. 1225), we have repeatedly rejected the contention (see, e.g., *People v. Frye, supra*, 18 Cal.4th at p. 1029; *People v. Bacigalupo, supra*, 6 Cal.4th at p. 467; *People v. Wader, supra*, 5 Cal.4th at p. 669). We are not persuaded that we should reconsider our previous rulings on this issue.

Defendant asserts that the multiple-murder special circumstance, which formed the basis for his death sentence, is "particularly deficient in terms of a narrowing function" for two reasons. First he claims it encompasses an "overly broad class of defendants of disparate and varying culpability." To the contrary, the multiple-murder special circumstance focuses on a narrow group of killers: only those who have murdered more than one person. Second, defendant asserts the multiple-murder special circumstance improperly focuses on the nature of the act committed rather than the defendant's mental state. We are not persuaded. One who is mentally prepared to commit repeated acts of murder, or to commit a murderous act that results in the death of two or more persons, is more dangerous to society and more deserving of the ultimate punishment than one who has killed once. (See generally *People v.*

Coddington, supra, ___ Cal.4th at p. ____ [pp. 152-153] [holding multiple-murder special circumstance constitutional].)

Defendant maintains that California's death penalty scheme is constitutionally defective because the enumerated aggravating and mitigating factors are vague, arbitrary and result in unreliable sentences. We have repeatedly rejected this contention. (*People v. Millwee, supra,* 18 Cal.4th at pp. 163-164; *People v. Freeman* (1994) 8 Cal.4th 450, 525; *People v. Webb* (1993) 6 Cal.4th 494, 535.)

Defendant argues that California's death penalty law violates the state and federal Constitutions because: (1) jurors do not have to find aggravating factors true beyond a reasonable doubt; (2) jurors need not find that aggravating factors outweigh mitigating factors beyond a reasonable doubt; (3) jurors need not return unanimous, written findings specifying the aggravating factors on which they relied; and (4) the statutory scheme does not provide for comparative or intercase proportionality review of a death sentence. He asserts that most other states have varying combinations of these procedural protections, and that California's failure to employ *any* of these safeguards violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. We have repeatedly held that each of these safeguards is not constitutionally required (see, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 862 [beyond-a-reasonable-doubt finding for aggravating circumstances not required; finding beyond a reasonable doubt that aggravation outweighs mitigation not required]; *People v. Osband, supra,* 13 Cal.4th at p. 710 [unanimous, written findings not required]; *People v. Majors* (1998) 18 Cal.4th 385, 432 [proportionality review not required]), and we find no federal constitutional violation when we consider them collectively.

DISPOSITION

The judgment of death is affirmed.

KENNARD, J.

WE CONCUR:

GEORGE, C.J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.

DISSENTING OPINION BY MOSK, J.

I dissent.

For the reasons that I stated when this cause was originally before us (see *People v. Lucero* (1988) 44 Cal.3d 1006, 1033–1036 (conc. & dis. opn. of Mosk, J.)), I would exercise the authority that we possess under sections 1181, subdivision 7, and 1260 of the Penal Code (see generally *People v. Hines* (1997) 15 Cal.4th 997, 1081–1082 (conc. opn. of Mosk, J.)), and would set aside the multiple-murder special-circumstance finding and the verdict of death, and remand the matter to the superior court for resentencing.

MOSK, J.

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	S012568
v.	)	
	)	
PHILIP LOUIS LUCERO,	)	
	)	San Bernardino County
Defendant and Appellant.	)	Super. Ct. No. 36822
	)	

BY THE COURT:

The opinion herein appearing at 23 Cal.4th 692 is modified as follows:

1. The words "had been disciplined for having a Vietnamese woman in his quarters in a village that was off-limits," in the fifth sentence of the fifth paragraph on page 711 are deleted and replaced with the following: "had been disciplined for having a Vietnamese woman in his quarters and for being in villages that were off-limits."

2. The words "had been disciplined for having a Vietnamese woman in his quarters in a village that was off-limits," in the second and third lines on page 733 are deleted and replaced with the following: "had been disciplined for having a Vietnamese woman in his quarters and for being in villages that were off-limits."

This modification does not affect the judgment.

[Filed August 30, 2000]

APPENDIX C

S012568

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Respondent,

v.

PHILIP LOUIS LUCERO, Appellant.

Petition for rehearing DENIED.

Opinion modified.
Mosk, J., is of the opinion the petition should be granted.

/s/George
Chief Justice

[Filed August 30, 2000]

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 17, 2000

Mr. Peter Dodd
P.O. Box 380
Hornbrook, CA 96044

RE: Philip Louis Lucero
v. California
Application No. 00A448

Dear Mr. Dodd:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on November 17, 2000, extended the time to and including December 28, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

BY /s/

Gail B. Johnson
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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NOTIFICATION LIST

Mr. Peter Dodd
P.O. Box 380
Hornbrook, CA 96044

Mr. Bill Lockyer
1300 I Street
Suite 1740
Sacramento, CA 95814

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

(2)

No. 00-1036

Supreme Court, U.S.
FILED
JAN 26 2001
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

PHILIP LOUIS LUCERO, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
ROBERT M. FOSTER
Supervising Deputy Attorney General
VINCENT L. RABAGO
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2288
Fax: (619) 645-2271
Counsel for Respondent

CAPITAL CASE
QUESTION PRESENTED

1. Whether a brief testimonial reference that a criminal defendant invoked his right to remain silent during a police interview by requesting counsel pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), violated federal case law when the reference was made by a law enforcement officer called by the defense to testify as a defense witness in the penalty phase retrial of a capital case where guilt was not at issue, where the answer responded to an open-ended defense question, when the defense waited until six witnesses had testified before moving for a mistrial, and when the testimony was ultimately stricken and the jury was expressly admonished to disregard it?

2. Whether a capital defendant can challenge the constitutionality of California's death penalty law during his appeal of a penalty-phase only retrial by arguing that California's statutory special circumstances are not adequate narrowing factors because they render too many murder cases eligible for the death penalty, when the defendant failed to raise any such challenge over ten years ago when the defendant's special circumstance was affirmed during a prior appeal to the California Supreme Court in 1988?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
Testimonial Reference To Petitioner's Miranda v. Arizona, 384 U.S. 436 (1966) Invocation	3
Petitioner's Direct Appeal On The Miranda Issue	5
Petitioner's Constitutional Challenge To California's Death Penalty Law	6
The California Supreme Court Decision	6
ARGUMENT	9
I. CERTIORARI SHOULD BE DENIED ON PETITIONER'S CLAIM CONCERNING THE TESTIMONY ABOUT HIS REQUEST FOR COUNSEL BECAUSE THE ISSUE WAS WAIVED BELOW, THE STATE COURT DECISION DOES NOT CONFLICT WITH FEDERAL LAW, THE FACTS OF THE PRESENT CASE ARE UNIQUE, AND BECAUSE THE	

TABLE OF CONTENTS (continued)

		Page
	STATE COURT CORRECTLY DECIDED THE ISSUE IN THE PRESENT CASE	9
II.	CERTIORARI SHOULD BE DENIED ON PETITIONER'S CLAIM THAT CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL BECAUSE IT INADEQUATELY NARROWS THE NUMBER OF MURDER CASES ELIGIBLE FOR THE DEATH PENALTY BECAUSE THIS ISSUE WAS WAIVED BY FAILING TO RAISE IT DURING A PRIOR APPEAL, BECAUSE THIS COURT HAS EXPRESSLY OR IMPLIEDLY REJECTED THE ISSUE, AND BECAUSE THE STATE COURT CORRECTLY DECIDED THE ISSUE	14
CONCLUSION		20
APPENDIX		App. 1

TABLE OF AUTHORITIES

Cases	Page
Boyde v. California 494 U.S. 370 (1990)	18
California v. Brown 479 U.S. 538 (1987)	18
California v. Ramos 463 U.S. 992 (1983)	18
Doyle v. Ohio 426 U.S. 610 (1976)	5, 11
Griffin v. California 380 U.S. 609 (1965)	11
Lindgren v. Lane 925 F.2d 198 (7th Cir. 1991) cert. denied, Lindgren v. McGinnis 502 U.S. 831 (1991)	12
Lowenfield v. Phelps 484 U.S. 231 (1988)	18
McCleskey v. Kemp 481 U.S. 279 (1987)	18
Miranda v. Arizona 384 U.S. 436 (1966)	4, 9, 11

TABLE OF AUTHORITIES (continued)

	Page
Noland v. French 134 F.3d 208 (4th Cir. 1998) cert. denied, Noland v. French 525 U.S. 851 (1998)	12
People v. Anderson 43 Cal. 3d 1104 742 P.2d 1306 240 Cal. Rptr. 585 (1987)	17
People v. Arias 13 Cal. 4th 92 913 P.2d 980 51 Cal. Rptr. 2d 770 (1996) cert. denied, Arias v. California 520 U.S. 1251 (1997)	17
People v. Bacigalupo 6 Cal. 4th 457 862 P.2d 808 24 Cal. Rptr. 2d 808 (1993) cert. denied, Bacigalupo v. California 512 U.S. 1253 (1994)	8, 17
People v. Crittenden 9 Cal. 4th 83 885 P.2d 887 36 Cal. Rptr. 2d 474 (1994) cert. denied, Crittenden v. California 516 U.S. 849 (1995)	17

TABLE OF AUTHORITIES (continued)

	Page
People v. Davenport 11 Cal. 4th 1171 906 P.2d 1068 47 Cal. Rptr. 2d 800 (1995)	15
People v. Earp 20 Cal. 4th 826 978 P.2d 15 85 Cal. Rptr. 2d 857 (1999) cert. denied, Earp v. California 120 S. Ct. 1272 146 L. Ed. 2d 221 (2000)	17
People v. Frye 18 Cal. 4th 894 959 P.2d 183 77 Cal. Rptr. 2d 25 (1998) cert. denied, Frye v. California 526 U.S. 1023 (1999)	7, 17, 18
People v. Holt 15 Cal. 4th 619 937 P.2d 213 63 Cal. Rptr. 2d 782 (1997) cert. denied, Holt v. California 522 U.S. 1017 (1997)	17
People v. Lucero 23 Cal. 4th 692 3 P.3d 248 97 Cal. Rptr. 2d 871 (2000)	1, 2, 7, 8

TABLE OF AUTHORITIES (continued)

	Page
People v. Lucero 44 Cal. 3d 1006 750 P.2d 1342 245 Cal. Rptr. 185 (1988)	2, 15
People v. Majors 18 Cal. 4th 385 956 P.2d 1137 75 Cal. Rptr. 2d 684 (1998) cert. denied, Majors v. California 526 U.S. 1007 (1999)	17
People v. Marshall 50 Cal. 3d 907 790 P.2d 676 269 Cal. Rptr. 269 (1990) cert. denied, Marshall v. California 498 U.S. 1110 (1991)	17
People v. Ray 13 Cal. 4th 313 914 P.2d 846 52 Cal. Rptr. 2d 296 (1996) cert. denied, Ray v. California 519 U.S. 967 (1996)	17
People v. Sanchez 12 Cal. 4th 1 906 P.2d 1129 47 Cal. Rptr. 2d 843 (1995) cert. denied, Sanchez v. California 519 U.S. 835 (1996)	17

TABLE OF AUTHORITIES (continued)

	Page
People v. Wader 5 Cal. 4th 610 854 P.2d 80 20 Cal. Rptr. 2d 788 (1993) cert. denied, Wader v. California 512 U.S. 1253 (1994)	8
People v. Warren 45 Cal. 3d 471 754 P.2d 218 247 Cal. Rptr. 172 (1988)	5
People v. Welch 20 Cal. 4th 701 976 P.2d 754 85 Cal. Rptr. 2d 203 (1999) cert. denied, Welch v. California 120 S. Ct. 1160 145 L. Ed. 2d 1071 (2000)	17
Pulley v. Harris 465 U.S. 37 (1984)	16, 19
State v. Lee 114 Ariz. 101 559 P.2d 657 (1976)	12
Tuilaepa v. California 512 U.S. 967 (1994)	18
United States v. Haro-Portillo 531 F.2d 962 (9th Cir. 1976)	12

TABLE OF AUTHORITIES (continued)

	Page
United States v. Mills 597 F.2d 693 (9th Cir. 1979)	12
Wainwright v. Goode 464 U.S. 78 (1983)	19
Wainwright v. Greenfield 474 U.S. 284 (1986)	5, 9, 11
Constitutional Provisions	
United States Constitution	
Fifth Amendment	1
Eighth Amendment	1, 6
Fourteenth Amendment	1, 6
Statutes	
California Penal Code	
§ 189	1, 18
§ 190	1, 18
§ 190.1	1
§ 190.1(a)	19
§ 190.2	1, 14, 18
§ 190.2(a)(3)	2
§ 190.3	1, 19
§ 190.4	1, 18

TABLE OF AUTHORITIES (continued)

	Page
Court Rules	
United States Supreme Court Rule 10	12

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-1036

PHILIP LOUIS LUCERO, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

OPINION OR JUDGMENT BELOW

The California Supreme Court opinion in People v. Lucero, 23 Cal. 4th 692, 3 P.3d 248, 97 Cal. Rptr. 2d 871 (2000), as modified August 30, 2000. (Petr.'s App. A and B.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. These provisions are set forth in the Petition for Writ of Certiorari at page 2. Sections 189, 190, 190.1, 190.2, 190.3, and 190.4 of the 1980 California Penal Code, are reproduced in Respondent's Appendix A.

STATEMENT OF THE CASE

In 1981, Petitioner Philip Louis Lucero was sentenced to death after a California jury found him guilty of two counts

of murder and one count of arson, and found true an alleged multiple-murder special circumstance pursuant to California Penal Code section 190.2(a)(3). In 1988, the California Supreme Court affirmed this judgment of guilt on direct appeal, including the multiple murder special circumstance finding, but reversed the judgment of death, holding that the trial court had improperly excluded certain mitigating evidence at the penalty phase of the 1981 trial. The case was remanded for a penalty phase retrial. People v. Lucero, 44 Cal. 3d 1006, 750 P.2d 1342, 245 Cal. Rptr. 185 (1988). After the penalty phase retrial in 1989, the jury imposed the death penalty. The trial court again sentenced Petitioner to death. Petitioner appealed the penalty retrial judgment. The California Supreme Court entered judgment affirming the death sentence on July 13, 2000, and denied a petition for rehearing on August 30, 2000. People v. Lucero, 23 Cal. 4th 692, 3 P.3d 248, 97 Cal. Rptr. 2d 871. (Petr.'s App. A and C.)

STATEMENT OF FACTS

Petitioner murdered two little girls and committed arson on April 12, 1980. After luring ten year old Teddy Engilman and seven year old Chrissy Hubbard into his home, he beat Teddy so forcefully with a heavy glass soda bottle that he fractured her skull into separate pieces and she died by inhaling her own blood while unconscious. Petitioner strangled Chrissy to death. Petitioner hid the bodies in a trash dumpster and tried to burn down his house which contained evidence of the murders, leaving his own dog behind to die in the fire. Police and firefighters responded and the dog was rescued. The bodies were found that night and Petitioner was soon arrested. Lucero, 23 Cal. 4th at 708-10. (Petr.'s App. A, at 2-3.)

Testimonial Reference To Petitioner's Miranda v. Arizona, 384 U.S. 436 (1966) Invocation

Petitioner called Deputy Sheriff Ronald Dvorak as a defense witness during the defense case of the penalty phase retrial. Petitioner's counsel asked Deputy Dvorak on direct examination to characterize Petitioner's demeanor during an April 12, 1980, police interview. When Deputy Dvorak tried to clarify whether the answer was wanted in "one word," defense counsel responded, "Or more, if you want." Deputy Dvorak then testified Petitioner was cordial while he was led to believe the officers were investigating the arson, but as time went on, it became more of a cat and mouse game to the point where Petitioner shut down the interview by saying, "I want to talk to my attorney." Petitioner's counsel did not object to the response. Upon further inquiry by defense counsel, Deputy Dvorak elaborated that Petitioner was subdued, perhaps too clam. By this, he meant Petitioner was playing cat and mouse, pretending that he did not understand some questions. Petitioner was self-serving and calm. (12 RT 3025-27.)[1]

Later, the prosecutor cross-examined Deputy Dvorak about the quality and tone of Petitioner's voice, but the defense objected that this exceeded the scope of direct examination. In chambers, the prosecutor asked to introduce Petitioner's police interview tape. The defense objected, saying that although they asked about Petitioner's demeanor, they did not ask about his tone of voice or statements. The prosecutor noted that demeanor includes tone and quality of voice, said the defense had made it an issue, and argued the tape was admissible. In the

---

1. "RT" refers to the reporters transcript of Petitioner's 1989 penalty retrial, designated here numerically by volume. Likewise, "1 CT" refers to volume one of the clerk's transcript of that 1989 retrial. "CT" refers to the clerk's transcript of Petitioner's 1981 trial.

context of arguing against admission of the tape, Petitioner's counsel noted in passing that any testimony concerning Petitioner invoking Miranda v. Arizona, 384 U.S. 436 (1966), rights should be stricken. (12 RT 3029-32.)

The trial court confirmed that the direct examination elicited an opinion about Petitioner's attitude as expressed by demeanor. The prosecutor argued the tape was admissible since the defense had elicited part of a statement. The defense argued Deputy Dvorak's response was voluntary. The trial court agreed, noting that the defense had gone into the conversation and whatever was brought out was a voluntary statement, not the result of a question. The trial court did not allow the prosecutor to introduce the interview tape during cross-examination, but said that it might be rebuttal evidence. (12 RT 3031-35, 3036.)

Thereafter, six more defense witnesses testified. (12 RT 3038-146.) At the beginning of the following day, defense counsel mentioned what he described as the partly non-responsive answer by Deputy Dvorak (particularly the part about Petitioner invoking his rights), said the answer was highly inadmissible for any purpose, and asked the trial court to declare a mistrial or to strike the response. (13 RT 3147-48.) The prosecutor opposed the motion, noting the answer was elicited in response to a very vague and open-ended defense question. The prosecutor argued that it would be a miscarriage of justice to grant a mistrial at that point based on evidence the defense had presented. The trial court agreed, stating that there was no basis for a mistrial and noting that the time to object had since passed. But the trial court did grant Petitioner's request to strike all of Deputy Dvorak's response after "cat and mouse game," and struck any testimony about Petitioner's desire to speak with counsel. (13 RT 3148-50.)

During rebuttal, the prosecution introduced the police interview tape. (15 RT 3863, 3866-67.) Beforehand, Petitioner wanted to make sure that any reference to his request for counsel was redacted from the tape and its transcript. Defense

counsel said he hoped that the prosecutor had instructed Deputy Dvorak to refrain from mentioning the Miranda invocation. Noting the earlier situation, defense counsel emphasized that he was sure that the earlier mention of Petitioner's request for counsel was an oversight by the witness. Confirming that the tape and transcript were edited, the prosecutor said he wanted to re-emphasize to Deputy Dvorak to refrain from referring to the invocation regardless of the nature of the question. (16 RT 3876-77.)

Petitioner's Direct Appeal On The Miranda Issue

On appeal of the penalty retrial before the California Supreme Court, Petitioner contended the trial court should have granted his motion for mistrial because the testimonial reference to Petitioner invoking his Miranda rights was prejudicial and constituted prosecutorial misconduct because the prosecution is precluded from introducing such evidence. Petitioner cited Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986), which collectively hold that the prosecution cannot penalize a defendant for invoking his Miranda rights to silence or counsel by using those invocations against the defendant at trial through evidence or argument.

Petitioner asserted that the prosecutor and Deputy Dvorak committed deliberate prosecutorial misconduct because the prosecution was on notice the defense was opposed to evidence of the Miranda invocation, and the witness should have known this. Petitioner claimed that since Deputy Dvorak was a law enforcement officer, the prosecutor was responsible for his testimony even though the testimony came when called as a defense witness, citing state case law requiring prosecutors to guard against inadmissible testimony from prosecution witnesses and to warn prosecution witnesses to refrain from giving such testimony. People v. Warren, 45 Cal. 3d 471, 481-82, 754 P.2d 218, 247 Cal. Rptr. 172 (1988). Petitioner argued

that the testimony was prejudicial error and could not be characterized as harmless beyond a reasonable doubt, and he claimed that it likely caused an unreliable penalty determination at his penalty retrial.

Petitioner's Constitutional Challenge To California's Death Penalty Law

On appeal, Petitioner also claimed that California's death penalty statutory scheme as a whole was facially unconstitutional because California's felony murder law makes virtually all murder cases first degree murder cases and because too many first degree murder cases are eligible for the death penalty due to the sheer number of statutory special circumstances. Petitioner argued that these laws do not adequately narrow the class of eligible death penalty defendants as required by the Eighth and Fourteenth Amendments.

The California Supreme Court Decision

The California Supreme Court disagreed with these claims. First addressing Petitioner's claim regarding his motion for mistrial, the court did not decide whether the issue was waived, assuming for the sake of argument that it had been preserved. The court found no error. The court discussed California case law which requires a trial court to grant a motion for mistrial when informed of prejudice that it judges to be incurable by admonition or instruction. Because the question of whether a particular incident is incurably prejudicial is inherently speculative, California trial courts are vested with considerable discretion in ruling on mistrial motions. The court held that ordinarily evidence a defendant has invoked the right to remain silent creates a danger that the jury will draw an impermissible inference of guilt from the testimony. The court

concluded that since Petitioner's guilt was not at issue at the penalty phase retrial, this danger did not exist in this case. The court also rejected the claim that the jury could have relied on the evidence to infer that Petitioner was acting in a cold blooded fashion after the murders and therefore conclude he should be sentenced to death, pointing out that neither the prosecutor nor the witness suggested that the jury should draw this inference. The court concluded the trial court did not abuse its discretion when it denied the motion for mistrial by concluding that Deputy Dvorak's testimony could be cured by an admonition to the jury to disregard it. Lucero, 23 Cal. 4th at 713-14. (Petr.'s App. A, at 8-9.)

The California Supreme Court separately addressed Petitioner's prosecutorial misconduct claims, including the claim that the testimonial reference to Petitioner's invocation of his rights was prejudicial misconduct. The court held that the record disclosed no evidence the prosecutor was in any way responsible for Deputy Dvorak's comment. The court rejected the state law claim that the prosecutor was responsible to warn Deputy Dvorak and guard against inadmissible evidence simply because Dvorak had been a prosecution witness and was a law enforcement officer, finding that this obligation arises when witnesses are called by the prosecution. Here, the witness was called by the defense, not the prosecution. The court also rejected the claim that Deputy Dvorak committed misconduct, finding that any possibility of prejudice was cured when the trial court struck the testimony and admonished the jury to disregard it. Id., at 718. (Petr.'s App. A, at 15-16.)

Concerning Petitioner's challenge to the constitutionality of California's death penalty statute, the California Supreme Court did not decide whether the claim could be properly raised since the special circumstance was not at issue at the penalty retrial. Assuming for the sake of argument that Petitioner could raise the contention, the court rejected the claim after noting that it had repeatedly rejected the same one before, citing People v. Frye, 18 Cal. 4th 894, 1029,

959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998), cert. denied, Frye v. California, 526 U.S. 1023 (1999), People v. Bacigalupo, 6 Cal. 4th 457, 467, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993), cert. denied, Bacigalupo v. California, 512 U.S. 1253 (1994), and People v. Wader, 5 Cal. 4th 610, 669, 854 P.2d 80, 20 Cal. Rptr. 2d 788 (1993), cert. denied, Wader v. California, 512 U.S. 1253 (1994). The court was not persuaded to reconsider its prior holdings. Lucero, 23 Cal. 4th at 740. (Petr.'s App. A, at 46.)

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S CLAIM CONCERNING THE TESTIMONY ABOUT HIS REQUEST FOR COUNSEL BECAUSE THE ISSUE WAS WAIVED BELOW, THE STATE COURT DECISION DOES NOT CONFLICT WITH FEDERAL LAW, THE FACTS OF THE PRESENT CASE ARE UNIQUE, AND BECAUSE THE STATE COURT CORRECTLY DECIDED THE ISSUE IN THE PRESENT CASE

Petitioner contends this Court should grant review because the prosecution violated his right to invoke Miranda v. Arizona, 384 U.S. 436 (1966), rights during a police interrogation without any adverse consequences at trial, and contends a decision will help lower courts resolve the issue of whether such a reference is prejudicial. Petitioner contends the California Supreme Court wrongly concluded that the reference to his Miranda invocation did not violate due process because the evidence was elicited at a penalty phase and guilt was not at issue, in light of the rationale of Wainwright v. Greenfield, 474 U.S. 284, 292 (1986), which found a due process violation in a sanity proceeding where the prosecution presented argument about a defendant's invocation of Miranda rights to prove sanity. Petitioner also disputes the California Supreme Court's finding of no prejudice, claiming that the court's reasoning that neither the prosecution nor the witness asked the jury to draw an inference in favor of death from the invocation is unpersuasive. (Pet. 6-9.) Respondent disagrees. Certiorari should be denied

because the present issue was waived, the California Supreme Court correctly decided the issue and its decision does not create a conflict of law, because the facts of the present care are unique and the evidence was stricken.

Preliminarily, Petitioner incorrectly claims that he raised a timely objection. There was no objection when Deputy Dvorak gave the response during the defense direct examination or before the prosecution began cross examination. And, although Petitioner did later request that any reference to Petitioner invoking his rights should be stricken, this occurred during a chambers conference on another issue during cross examination. No ruling was sought and no further mention was made until the next day when the defense moved for a mistrial. By then, six other defense witnesses had testified. Although the California Supreme Court did not decide the question of waiver, the issue was clearly waived and certiorari is therefore inappropriate.

In addition, contrary to Petitioner's claim, the California Supreme Court did not conclude that a due process violation did not exist simply because the case involved a penalty phase retrial where guilt was not at issue. (Pet. 7.) The California Supreme Court relied on that factual distinction while discussing whether there was prejudice requiring the trial court to grant a motion for mistrial. In this context, the court distinguished the ordinary situation where there is a recognized danger that a jury will draw an inference of guilt from evidence of an invocation of Miranda rights. The court held there was no such danger of prejudice here because guilt was not at issue. Next, the court rejected the claim that the jury could have relied on the testimony to conclude that Petitioner was cold blooded after the murders and therefore should receive the death penalty, finding that neither the prosecutor nor the witness suggested the jury should draw this inference. The court concluded that the trial court had not abused its discretion when it denied Petitioner's motion for mistrial by concluding that Deputy Dvorak's testimony could be cured by an admonition to the jury

to disregard it. (See Petr's App. A, 8-9.) Thus, Petitioner erroneously characterizes the decision by reading its language out of context.

Additionally, certiorari should be denied because the lower court's decision was correct and does not conflict with this Court's precedents. Miranda stated that the prosecution cannot use at trial the fact that a defendant stood mute or invoked his Miranda privilege in the face of an accusation. Miranda, 384 U.S. at 468, n.37, citing Griffin v. California, 380 U.S. 609 (1965). Doyle v. Ohio, 426 U.S. 610 (1976), held that the prosecution cannot use evidence of a Miranda invocation for impeachment at trial. Wainwright held that the prosecution could not argue that a defendant's request for counsel under Miranda was evidence of his sanity. Wainwright, 474 U.S. at 292. Collectively, these cases preclude state and federal prosecutors from introducing and using such evidence against criminal defendants.

Here, the California Supreme Court correctly concluded that the prosecutor never introduced such evidence against Petitioner as there was no evidence that the prosecutor was in any way responsible for Deputy Dvorak's testimony when he testified as a defense witness during the defense case. Also, as the court correctly explained, the prosecution's duty to guard against inadmissible statements from his witnesses and to warn his witnesses does not extend to situations where the witness is called by the defense. In the context of finding no prejudice, the court pointed out that neither the prosecutor nor the witness suggested the jury should use the testimony to draw an inference that Petitioner was cold blooded and should receive the death penalty. (Petr's App. A, 15-16.) Thus, the rationale of Doyle, Wainwright, or similar cases is inapplicable to the facts of the present case. These precedents are not contrary to the state court decision because the prosecutor here never introduced or used the evidence against Petitioner.

Because the brief testimonial reference to Petitioner's invocation of Miranda rights was not prejudicial and was not

used against him, the testimony did not violate any precedents barring comment on a defendant's invocation of Miranda rights or the introduction of such evidence. The conclusion is consistent with those federal circuits that have considered similar claims where a prosecution law enforcement witness briefly testifies about a defendant's invocation but that testimony is not otherwise used against the defendant in any way. See Noland v. French, 134 F.3d 208, 216-17 (4th Cir. 1998), cert. denied, Noland v. French, 525 U.S. 851 (1998); Lindgren v. Lane, 925 F.2d 198, 201-03 (7th Cir. 1991), cert. denied, Lindgren v. McGinnis, 502 U.S. 831 (1991); United States v. Mills, 597 F.2d 693, 696 (9th Cir. 1979); United States v. Haro-Portillo, 531 F.2d 962, 963-64 (9th Cir. 1976). Nor is there any conflict among the states. The only other state supreme court to consider a similar issue also found no violation of the rule precluding the prosecution from arguing or introducing such evidence where the invocation was briefly mentioned in prosecution testimony by a law enforcement officer and not otherwise used by the prosecution. State v. Lee, 114 Ariz. 101, 103-04, 559 P.2d 657 (1976).

Aside from the fact that the prosecution did not introduce or use the testimony, the court correctly decided that the prosecutor was not responsible for Deputy Dvorak's response and was not required to warn him or guard against inadmissible evidence because the case involved the defense questioning a defense witness. And, the trial court struck the offending testimony on request and admonished the jury to disregard it. These facts provide further reason for denying certiorari because the case would be limited to its unique facts.

Petitioner has failed to present an issue worthy of review under Rule 10 of the Rules of the Supreme Court of the United States. The state court has not decided an important federal question in a way that conflicts with other state courts of last resort, or with federal circuit courts. Nor did the state court decide an important issue of federal law that has not been, but should be, settled by this Court. Finally, the state court decision

does not conflict with relevant decisions of this Court. No rule of law requires this Court to hear this case.

II.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S CLAIM THAT CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL BECAUSE IT INADEQUATELY NARROWS THE NUMBER OF MURDER CASES ELIGIBLE FOR THE DEATH PENALTY BECAUSE THIS ISSUE WAS WAIVED BY FAILING TO RAISE IT DURING A PRIOR APPEAL, BECAUSE THIS COURT HAS EXPRESSLY OR IMPLIEDLY REJECTED THE ISSUE, AND BECAUSE THE STATE COURT CORRECTLY DECIDED THE ISSUE

Petitioner contends California's death penalty statute as a whole is facially unconstitutional because fails to provide a meaningful narrowing of the class of murderers eligible for death. Petitioner contends that almost all first degree murderers, and the vast majority of all murderers, are death eligible in California because of the number of special circumstances set forth in California Penal Code section 190.2, which provides nineteen circumstances of first degree murder cases that are death eligible, and because California's felony murder rule allows for virtually every murder case to be a first degree murder case. (Pet. 8-13.) Respondent disagrees. Certiorari should be denied because Petitioner failed to preserve the claim and failed to present facts showing there was insufficient narrowing in this case, because this Court has expressly or impliedly rejected the issue, and because the state court correctly rejected the claim.

First, Petitioner distorts the record by claiming that he properly preserved this issue with a timely objection. Petitioner

waived the issue by not challenging the statute on this basis at his 1981 trial or at all during his first appeal which was decided in 1988. Before the 1981 trial, Petitioner had moved to dismiss the multiple murder special circumstance allegation, claiming, among other things, that it was unconstitutionally vague and ambiguous. (CT 112-19.) But Petitioner did not raise his vagueness argument or the instant challenge to the entire statute in his first appeal. People v. Lucero, 44 Cal. 3d 1006, 750 P.2d 1342, 245 Cal. Rptr. 185 (1988). In that prior 1988 appeal, the California Supreme Court affirmed the special circumstance but reversed the death judgment for evidentiary reasons and remanded the case for a retrial on the penalty phase. Id., at 1032.

Before the penalty phase retrial in 1989, Petitioner again unsuccessfully moved to dismiss the special circumstance allegation or to bar imposition of the death penalty, citing statutory grounds, and various cases and constitutional provisions, while arguing that death would be an unconstitutionally cruel and unusual punishment, and disproportionate, on the facts of his particular case. (1CT 132-54, 279.) The trial court denied the motion because there was "no legitimate basis" for it to dismiss the special circumstance. (1 RT 85.) But the 1989 retrial only involved the penalty, not the special circumstance providing Petitioner's eligibility for the death penalty as decided by the first jury in 1981. That guilt phase issue was not the subject of the penalty retrial, irrespective of Petitioner's belated motion to dismiss the special circumstance before the retrial and irrespective of the California Supreme Court's failure to decide this point in its recent decision. Petitioner could not properly raise such issues at the penalty phase retrial in 1989. People v. Hayes, 11 Cal. 4th 1171, 1225, 906 P.2d 1068, 47 Cal. Rptr. 2d 800 (1995).

Even if Petitioner could have properly challenged the statute at the 1989 penalty retrial, he never argued that the law failed to adequately narrow the class of eligible murderers, instead claiming the penalty was unconstitutionally cruel and

unusual on the facts of his case, and disproportionate compared with others. (1CT 132-54, 279.) It is simply too late in the day for Petitioner to successfully attack the constitutionality of California's 1978 death penalty law.

In any event, certiorari should also be denied because this Court has already expressly or impliedly considered the constitutionality of California's death penalty law. There is no reason for this Court to suddenly change course to consider this particular question.

The constitutionality of California's 1977 death penalty law, superseded by a 1978 initiative, was essentially upheld in Pulley v. Harris, 465 U.S. 37, 31-33 (1984), where the absence of proportionality review was challenged. This Court noted that the requirement for a California jury to find at least one special circumstance limited the death sentence to a small subclass of eligible cases and the list of statutory penalty factors suitably directed and limited the jury's discretion. Further noting the trial judge's review of the decision and state supreme court review, this Court described California's system as being "a far cry from the major systemic defects identified in [Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)]." Harris, at 53-54. This Court noted that the 1978 law replaced the 1977 law with the "substantially similar provisions now in effect." Harris, at 40, n.1. In Harris, this Court noted that the current statute had greatly expanded the statutory special circumstances from the seven circumstances listed in the 1977 law. Id., at 53, n.13.

And, in a long line of prior cases, the California Supreme Court has repeatedly rejected claims identical to the one raised by Petitioner here, finding that California's 1978 death penalty law is essentially identical to the prior 1977 law by requiring the jury to find at least one special circumstance beyond a reasonable doubt, thereby limiting the death sentence

to a small sub[illegible]bclass of murders.[2] These conclusions are correct. See People v. [illegible]v. Frye, 18 Cal. 4th 894, 1029, 959 P.2d 183, 77 Cal. Rptr. 2d [illegible]125 (1998).

Pe[illegible]titioner maintains that California's special circumstance[illegible]es are too many and overly inclusive. But the California [illegible]Supreme Court has held that these special circumstance[illegible]es are not over-inclusive by their number or terms. People v. Ra[illegible]y, 13 Cal. 4th 313, 356-57, 914 P.2d 846, 52 Cal. Rptr. 2d 29[illegible]5 (1996), cert. denied, Ray v. California, 519 U.S. 967 (1996); People v. Crittenden, 9 Cal. 4th 83, 154-56, 885 P.2d 887, 36[illegible]5 Cal. Rptr. 2d 474 (1994), cert. denied, Crittenden v. California[illegible], 516 U.S. 849 (1995). Also, Petitioner's claim that the felony [illegible]murder rule makes too many murders into first [illegible]rder cases was implicitly rejected in People v. Anderson, [illegible]43 Cal. 3d 1104, 1147, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987), and People v. Marshall, 50 Cal. 3d 907, 946, 790 P.2d 676, 269 Cal. Rptr. 269 (1990), cert. denied, Marshall v.

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2. E.g., People v. Bacigalupo, 6 Cal. 4th 457, 467, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993), cert. denied, Bacigalupo v. California, 512 U.S. 1253 (1994); People v. Earp, 20 Cal. 4th 826, 904-05, 978 P.2d 15, 85 Cal. Rptr. 2d 857 (1999), cert. denied, Earp v. California, 120 S. Ct. 1272, 146 L. Ed. 2d 221 (2000); People v. Welch, 20 Cal. 4th 701, 766-67, 976 P.2d 754, 85 Cal. Rptr. 2d 203 (1999), cert. denied, Welch v. California, 120 S. Ct. 1160, 145 L. Ed. 2d 1071 (2000); People v. Majors, 18 Cal. 4th 385, 432, 956 P.2d 1137, 75 Cal. Rptr. 2d [illegible], cert. denied, Majors v. California, 526 U.S. 1007 (1999); People v. Holt, 15 Cal. 4th 619, 697, 937 P.2d 213, 63 Cal. Rptr. 2d 782 (1997), cert. denied, Holt v. California, 522 U.S. 1017 (1997); People v. Arias, 13 Cal. 4th 92, 186-87, 913 P.2d 980, 51 Cal. Rptr. 2d 770 (1996), cert. denied, Arias v. California, 520 U.S. 1251 (1997); People v. Sanchez, 12 Cal. 4th 1, 60-61, 906 P.2d 1129, 47 Cal. Rptr. 2d 843 (1995), cert. denied, Sanchez v. California, 519 U.S. 835 (1996).

California, 498 U.S. 1110 (1991), which held that the felony murder special circumstance itself was an adequate narrowing factor. Frye, 18 Cal.4th at 1030.

Furthermore, this Court has impliedly rejected Petitioner's claim by repeatedly upholding various parts of the 1978 law as constitutional. California v. Ramos, 463 U.S. 992, 1004, n.19 (1983) [California's death penalty law complies with the mandate to permit a defendant to present any evidence to show that a penalty less than death is appropriate]; California v. Brown, 479 U.S. 538, 543 (1987) [in context of a penalty factors instruction, the Court noted its "approval of this statutory scheme."]; see Boyde v. California, 494 U.S. 370 (1990). In Tuilaepa v. California, 512 U.S. 967, 975-80 (1994), this Court held that three of California's penalty factors were constitutional while expressly proceeding on the assumption that California's statutory eligibility factors were adequate.

The California Supreme Court correctly concluded that California's 1978 death penalty law is constitutional. A death penalty law is constitutional if it suitably narrows the class of death-eligible defendants, and then provides for an individualized penalty determination. McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987). The narrowing may occur at the guilt or sentence selection stage. Lowenfield v. Phelps, 484 U.S. 231 (1988). A narrowing factor must meet two requirements. First, it may not apply to every defendant convicted of murder and must only apply to a subclass of defendants convicted of murder. Second, it may not be unconstitutionally vague. Tuilaepa, 512 U.S. at 971-72.

California limits the scope of its capital homicide laws by dividing murder into degrees and making death sentences discretionary even in first-degree murder cases. Cal. Penal Code §§ 189, 190. California narrows the class of murderers eligible for the death penalty by providing that only first degree murderers are eligible and by requiring special circumstances to be found true before such a defendant may be eligible for a death sentence. Cal. Penal. Code §§ 190.2, 190.4. At the guilt

phase of a capital trial in California, the trier of fact determines whether the special circumstances alleged by the prosecution are true. Cal. Penal Code § 190.1(a). At the penalty phase, the trier of fact weighs any aggravating circumstances, including any special circumstances found to be true, against any mitigating circumstances in deciding whether the defendant should receive death or life in prison without possibility of parole. Cal. Penal Code § 190.3. Accordingly, California's narrowing factors ensure that imposition of the death penalty is not arbitrary and "freakish." Cf. Wainwright v. Goode, 464 U.S. 78, 87 (1983) (per curiam; Florida law).

Finally, certiorari should be denied because Petitioner cannot show that his rights were violated in this case because the multiple murder special circumstance found to be true in the present case was one of the special circumstances contained in the 1977 California death penalty statute held to be constitutional in Harris. Harris, 456 U.S. at 53-54. Accordingly, the instant case is not worthy of review. Therefore, certiorari should be denied.

CONCLUSION

Accordingly, Respondent respectfully asks that the Petition for Writ of Certiorari be denied.

Dated: January 25, 2001

Respectfully submitted,

BILL LOCKYER
Attorney General
of the State of California

DAVID P. DRULINER
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

ROBERT M. FOSTER
Supervising Deputy Attorney General

Vincent L. Rabago

VINCENT L. RABAGO
Deputy Attorney General
Counsel of Record

Counsel for Respondent

VLR:bjm
SD1989XS0010

California Penal Code, § 189 (Deering's Cal. Code, Ann. 1980)

§ 189. [Degrees of murder.] All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

California Penal Code, § 190 (Deering's Cal. Code, Ann. 1980)

§ 190. [Punishment for murder.] Every person guilty of murder in the first degree shall suffer death, confinement in the state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time. [Initiative adopted November 7, 1978.]

California Penal Code, § 190.1. (Deering's Cal. Code, Ann. 1980)

§ 190.1. [Procedure in case involving death penalty.] A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4. [Initiative adopted November 7, 1978.]

California Penal Code, § 190.2 (Deering's Cal. Code, Ann. 1980)

§ 190.2. [Mandatory penalty upon special findings.] (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4,

830.5, 830.5a, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that the victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State

of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious, or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of subdivision Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. [Initiative adopted November 7, 1978.]

California Penal Code, § 190.3. (Deering's Cal. Code, Ann. 1980)

§ 190.3. [Determination of imposition of death penalty or life imprisonment upon finding of special circumstance; Admission of evidence.] If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation,

and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation. The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of

any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating

circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. [Initiative adopted November 7, 1978.]

California Penal Code, § 190.4. (Deering's Cal. Code, Ann. 1980)

§ 190.4. [Special finding on truth of each alleged special circumstance.] (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining

special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to

be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered on any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6). [Adopted by initiative November 7, 1978.]